Buffalo Law Review

Volume 37 | Number 2 Article 5

4-1-1988

Republicanism, Imperialism, and Sovereignty: A History of the Doctrine of Tribal Sovereignty

Jane M. Smith
Fried, Frank, Harris, Shriver & Jacobson

Republicanism, Imperialism, and Sovereignty: A History of the Doctrine of Tribal Sovereignty

JANE M. SMITH*

I. INTRODUCTION

INDIAN tribes have enjoyed a variety of curious legal statuses and relationships with the United States and individual states. In the early nineteenth century, tribes were recognized as sovereign nations, separate from the states but subject to the jurisdiction of the federal government by terms of treaties.[1] In the early twentieth century, tribes were identified as dependent, distinct, and uncivilized communities subject to plenary federal control.[2] Currently, tribes are deemed to possess attributes of sovereignty, manifest in limited rights of self-government, derived from federal policy.[3] This Article traces the changes in the federal judiciary's view of Indian tribes and attempts to identify the ideological values that drove those changes. The Article focuses on judicial opinions because so much of Indian law is judge-made, having developed with little guidance from the Constitution or any other source of law.[4] In creating and developing Indian law, federal judges drew on their ideas and assumptions about sovereignty, the power and role of government, and the role of the

* Associate, Fried, Frank, Harris, Shriver & Jacobson, Washington D.C.; B.A. Cornell University, 1982; J.D. State University of New York at Buffalo, Faculty of Law and Jurisprudence, 1987. The author thanks Guyora Binder, Fred Konefsky, and Tom Jensen for comments on earlier drafts of the Article. Errors, if any, are the author's alone.

1. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

2. *See* United States v. Sandoval, 231 U.S. 28 (1913).

3. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

4. The Constitution refers to Indians twice:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . . .

U.S. CONST. art. I, § 8, cl. 1, 3.

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3.

citizen. This Article, therefore, explores the values and images underlying Indian law doctrines and decisions. Because the status of Indian tribes is inextricably linked to the rights and powers of the federal and state sovereigns, this Article examines the judiciary's view of those sovereigns and their interrelationships also.

The judiciary has drawn on two very different political traditions, republicanism and imperialism, to inform its Indian law decisions. Republicanism is based on a community model of political relationships. Republican sovereignty derives from the people and is committed to maintaining the freedom, equality, and participation of all members of the republic. Power exercised to another end, or that upsets the equal distribution of freedom among members, is illegitimate and no longer sovereign. In contrast, imperial sovereignty is based on de facto power. It is committed to achieving the empire's military and commercial supremacy. The empire thrives on inequality and hierarchy as the best organization to fulfill its aims. The Founders called on both traditions in creating the dual sovereignty of the federal government and the states within the federalist system. When the courts had to define a third type of sovereign, the tribes, they too turned to these traditions.

In the early nineteenth century, John Marshall viewed the federal sovereigns as an empire, capable of extending its authority over the tribes to the extent that their strength and power allowed.[5] Later in the century, a federal court invoked images of the republic to find that Indians living like white people were part of the state polity, while those still living like Indians were subject to federal control.[6] In the second half of the nineteenth century, the judiciary enforced a stronger imperial vision of federal power, as the federal government assumed greater control over the tribes and managed them to serve its expansion. At the same time, republican principles persisted to exclude Indians from citizenship and membership in the federal political community.[7] In the twentieth century, following the New Deal, federal power continued to grow and become more centralized, bureaucratic, and imperial, while republican principles continued to exclude the tribes from state jurisdiction.[8] In the second half of the century, republican rhetoric disappeared from judicial opinions altogether. Now, tribal and state powers depend on federal policy, that is, the discretion of the federal sovereign. The federal sovereign

5. *See infra* notes 71-102 and accompanying text.
6. *See infra* notes 110-13 and accompanying text.
7. *See infra* notes 128-54 and accompanying text.
8. *See infra* notes 194-209 and accompanying text.

determines, much as an empire would, the relationship of the states and tribes, and the power each possesses.[9] This history of Indian law, therefore, reflects not only how the judiciary has viewed the tribes and their members. It reflects also how the federal judiciary has viewed federal and state sovereignty, the relationship between them, and how those visions have changed.

Part II of this Article explains the traditions of republicanism and imperialism. Part III studies colonial and federal policies and doctrines through the middle of the nineteenth century and analyzes how they reflect republican and imperial values. Part IV chronicles how republican and imperial visions interacted in the opinions and policies of the late nineteenth and early twentieth centuries as the nation expanded and developed a commercial economy. Finally, Part V studies the Indian policies and opinions of the last fifty years and traces the rise of imperial images and the demise of republican values.

II. THE REPUBLIC AND THE EMPIRE

In defining the relationships of the federal government, the states, and the tribes, the federal judiciary has invoked two conflicting political traditions: republicanism and imperialism. Americans inherited republicanism from the classical political theories of Aristotle, the renaissance theories of Machiavelli, the "Country" ideology of seventeenth century Britain, and the political theories of Harrington.[10] Republican ideology influenced the structure of the government of the United States, particularly under the Articles of Confederation.[11] It justified the Founders' reliance on the people and their consent as the source of sovereign power. The young nation's fear that political parties, standing armies, and a national bank would subvert the peoples' capacity to exercise their sovereign authority manifested republican values.[12] But America inherited a tradition of imperialism also. America found these values in history, spe-

9. *See infra* notes 234-46 and accompanying text.

10. For a study of the development of republican theory from Aristotle to the American Revolution, see J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

11. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 354-429 (1969) (discussing government under the Articles of Confederation).

12. Such institutions represent the classic sources of corruption in the forms of divisiveness, dependency, and commerce. J. POCOCK, *supra* note 10, at 463-64; G. WOOD, *supra* note 11, at 401-03.

cifically in the histories of the Roman and British empires.[13] The American colonies were the product of European imperialism and, in the eighteenth century, were recognized as the future of the British empire.[14] Before the struggle for independence, the colonies appreciated their potential for imperial grandeur[15] and fought to fulfill that potential.[16] Paradoxically, the colonists invoked republican rhetoric to achieve that independence.[17] Following the Revolutionary War, republican theories flourished and were incorporated into the Articles of Confederation.[18] But in time, fear of majoritarian tyranny and excessive state power, at the expense of military and commercial strength and personal rights, prompted reforms to increase aristocratic or elite authority and imperial national power under the Constitution.[19]

---

13. *See* R. KOEBNER, EMPIRE (1961) (reviewing the theme of empire in the history of political thought through the American Revolution).

14. *Id.* at 86. Benjamin Franklin wrote in 1760:

> "I have long been of opinion that the *foundations of the future grandeur and stability of the British Empire lie in America.* . . . All the country from the St Lawrence to the Mississippi will, in another century, be filled with British people. . . . Britain itself will become vastly more populous by the increase of its commerce; the Atlantic sea will be covered with [British] trading ships. . . ." The American foundations of the British Empire, "though, like other foundations, they are low and little now . . . they are nevertheless broad and strong enough to support the greatest political structure that human wisdom ever yet erected."

Id. at 116 (quoting 4 THE WRITINGS OF BENJAMIN FRANKLIN 122 (A. Smyth ed. 1906) (emphasis added)).

15. Koebner explains:

> What in 1760 was called the American 'foundations of the future grandeur of the British Empire' was in 1776 assumed to be the reality that gave to the United States a 'separate and equal station . . . among the powers of the earth'. It was the vision of an American world in emergence. On the first occasion it had appeared to herald a new epoch of the British Empire; on the second it gave substance to a new political entity which denied allegiance to that Empire.

Id. at 117.

16. R. VAN ALSTYNE, THE RISING AMERICAN EMPIRE 1-3 (1960). "The War of American Independence was conceived and fought under the spell of an imperial idea . . . . It was the idea that the continent of North America belonged, as of right, to the people of the thirteen colonies of the Atlantic seaboard." *Id.* at 78.

17. *See* G. WOOD, *supra* note 11, at 3-45 (describing the ideology and rhetoric supporting colonial independence).

18. *Id.* at 354-63.

19. *See generally id.* at 471-518 (describing the political and philosophical discussions of the Constitutional Convention of 1787); R. VAN ALSTYNE, *supra* note 16, at 3 ("The framers of the Constitution intended a Leviathan type of state, as Thomas Hobbes conceived it—one that would be perpetual and not subject to revolution or withdrawal at the hands of its component parts.").

A. *The Republic*

The republic is based on the equality, liberty, and political nature of its citizens. Every citizen is considered to have the capacity and responsibility to legislate—that is, to be civically active.[20] The sovereign authority of the state derives from the "intelligence and virtue of all citizens" mobilized to legislate for the "public good."[21] The public good is the state of political equality, liberty, and participation on which the republic depends. It is not an amorphous denomination of the majority's will. Rather, the public good is universal and discernible within the republic. Government that serves the interests of a few, rather than the interests of the whole, is despotic and illegitimate.[22] A republic can overcome despotism only if its citizens are capable of transcending particular differences between themselves to legislate for the welfare of the whole. The greatest strength of the republic is this devotion to the welfare of the people;[23] its greatest weakness is its absolute dependence on the morality of the people.[24]

The survival and success of a republic depends on two related factors: the virtue of its citizens and a uniform concept of the public good among them. Virtue is the capacity of individuals to subordinate their private and particular interests to the public and universal interests of the whole.[25] To be virtuous, citizens must be rational. Private and particular wants are driven by irrational passions; the public and universal objects of the republic are discerned and achieved only through reasoned contemplation.[26] Although views of the public good may differ among citi-

20. Classical Aristotelian republican theory presumed humans to be inherently political:

> Aristotle taught that every human activity was value-oriented in the sense that it aimed at some theoretically identifiable good; that all value-oriented activity was social in the sense that it was pursued by men in association with one another; and that the polis or republic was the association within which all particular associations pursued their particular ends. . . . Citizenship was a universal activity, the polis a universal community.

J. POCOCK, *supra* note 10, at 67-68.

21. *Id.* at 94.

22. "A hidden oligarchy behind a republican facade must lack rationality, because it did not direct the intelligence of all to the good of all; it must lack virtue, because it subjected the good of all to the good as seen by a limited number . . . ." *Id.*

23. "By definition [the republic] had no other end than the welfare of the people." G. WOOD, *supra* note 11, at 55.

24. *See id.* at 65-70.

25. J. POCOCK, *supra* note 10, at 36-38. "In a republic . . . each man must somehow be persuaded to submerge his personal wants into the greater good of the whole." G. WOOD, *supra* note 11, at 68.

26. *See* J. POCOCK, *supra* note 10, at 471-72.

zens, each citizen must account for the welfare of others and must act to fulfill whatever public good she or he conceives.[27]

To overcome passions and to achieve virtue, citizens must be economically independent and physically secure. Without this security, they can perceive personal circumstances and needs only.[28] Such preoccupation is corruption.[29] Corruption threatens the virtue of every citizen and the integrity of the republic by displacing public concerns and authority with private interests and power.[30] The greatest defense against corruption is widely and equally distributed private property.[31] Property secures economic independence and physical well-being so she or he can deliberate the welfare of the republic and its members. Dependency, therefore, is a source of corruption. An individual is dependent, regardless of cash holdings, if her or his wealth flows from other people. Reliance on others for wealth subjects the citizen to the others' control. The citizen cannot act her or his own conscience if others threaten the source

27. "[P]olitics was conceived to be not the reconciling but the transcending of the different interests of the society in the search for the single common good . . . . " G. WOOD, *supra* note 11, at 58. "The ideal which republicanism was beautifully designed to express was still a harmonious integration of all parts of the community." *Id.* at 60.

28. The modern republican citizen, like

> the Aristotelian citizen . . . must have a household of his own to govern so that he may not be another man's servant, so that he may be capable of attaining good in his own person and so that he may apprehend the relation between his own good and that of the polis.

J. POCOCK, *supra* note 10, at 203.

29. "If men no longer enjoyed the conditions thought necessary to make them capable of perceiving the common good, all that each man was capable of perceiving was his own particular interest. . . ." *Id.* at 522.

30. "[L]oss of liberty and the corruption of the body politic occurred when men, by compulsion or out of effeminancy, expected from others what they should have expected from themselves as members of the public." *Id.* at 203-04. The classic example of such a substitution of public authority for private obligation is the republic's use of mercenary soldiers:

> The citizens would be corrupted because they permitted inferiors to do for them what should be done for the public good; the mercenaries would be agents of that corruption because they performed a public function without regard for the public good; and any ambitious individual could set himself above the republic and destroy it, by bringing the unthinking mercenaries to do for him what should only be done for the public, but had been allowed by unthinking citizens to pass out of public control.

Id. at 204.

31. The principle of equality is the "life and soul" of the republic. G. WOOD, *supra* note 11, at 70 (quoting Ramsay, *Oration on Advantages of American Independence*, in PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 375 (H. Niles ed. 1876)). Property carried with it the political and moral capacity of the citizen to legislate for the public good. Political equality, therefore, could be achieved only through equal distribution of property. However, rather than redistribute property in the interest of political equality, the concept of "equality of opportunity" was developed to overcome this conceptual inconvenience. *See* G. WOOD, *supra* note 11, at 70-75.

of wealth for doing so. Because dependent forms of wealth, such as finance capital, rental properties, wages, and salaries, are subject to another's willingness to pay, financiers, renters, mercenaries, bureaucrats, and servants are not independent in the sense the republic requires.[32]

Although citizens may differ as to the true public good, their views must be similar enough[33] that inconsistent visions of the public good are not pursued by factions.[34] Factions subvert republican sovereignty because faction members pursue the interest of the faction at the expense of the interests of the whole. The republic, therefore, cannot tolerate intermediate groups that distract from contemplation of the public good or undermine citizens' commitment to the welfare of the whole.

The requirement of a uniform public good limits the republic in two significant ways. First, it restricts membership in the republic to people of similar histories, customs, practices, and occupations.[35] Second, it restricts the geographical size of the republic to ensure that each citizen participates in the legislative process.[36] Only through universal participation may the public good serve the interests of the republic as a whole.

The requirement of a virtuous citizenry is in tension with the requirement of a unified vision of the public good because a republic cannot fulfill one condition without failing the other. As the population increases and the economy develops, the republic needs more land to support a virtuous citizenry. If the republic fails to acquire more land, citizens will turn to commerce for wealth and economic security. As they become dependent on others for their wealth and subsistence, they will lose the ability to overcome their passions and deliberate on the welfare of the whole. The citizens no longer will be virtuous. But, if the republic expands to make more land available, it also exposes itself to the threat of

---

32. J. POCOCK, *supra* note 10, at 464.

33. "What made the . . . republican emphasis on the collective welfare of the people comprehensible was the assumption that the people . . . were a homogeneous body whose 'interests when candidly considered are one.' " G. WOOD, *supra*, note 11, at 57-58.

34. "Corruption is the rise of factions, of overmighty citizens, a moral condition affecting the powerful and their dependents with equal corrosiveness . . . ." J. POCOCK, *supra* note 10, at 209.

35. One of the republican assumptions of the antifederalists was that

> A republic, wholly based as it was on the suffrage of the people, had to possess a population homogeneous in its customs and concerns. Otherwise the unitary public good, the collective welfare of the people that made a republic what it was, would be lost in the clashing of 'interests opposite and dissimilar in their nature.'.

G. WOOD, *supra* note 11, at 500.

36. "The polity must be a perfect partnership of all citizens and all values since, if it was less, a part would be ruling in the the name of the whole, subjecting particular goods to its own particular goods and moving toward despotism and the corruption of its own values." J. POCOCK, *supra* note 10, at 75.

corruption.[37]

Expansion poses three threats to a virtuous citizenry. First, if new citizens do not share the interests of the established republic, their differences would threaten the shared vision of the public good necessary for republican governance. Second, residents of the newly acquired area may be unable to participate in the legislative process if the seat of government is too far away. Third, people in areas acquired by conquest may threaten the virtue of the citizenry by the inequality and subordination their presence might foster.[38] If defeated peoples are treated as citizens, they may be dependent and incapable of legislating virtuously.[39] If they are held as slaves, their presence would infect the virtue of the citizens by rendering those citizens dependent on slave labor. Therefore, in expanding beyond its original borders to claim more land for its citizens, a republic must be very discriminating. Only areas populated by persons of similar heritage and interests, who are capable of being virtuous and who will not disturb the political uniformity of the state, may be incorporated.

In addition to the threats posed by expansion, a republic is threatened constantly by the corruption of commerce.[40] While simple trade is not inconsistent with republican virtue, commerce based on credit is a dynamic force that undermines the virtue of the citizens and the integrity of the republic. Credit introduces values that fluctuate with the market or the judgment of another person.[41] Commercial relations, therefore, reduce the stability and certainty of a land-based society to the instability and variability of the market. People cannot be virtuous in such a society because the particular and changing values of the credit economy overwhelm the universal and stable values of the land-based economy. A republic can maintain the virtue of the people only by tying all social and economic relations to land so that property, rather than

37. As Pocock phrased it, the republic "faced the dilemma, born of its finitude, that it could escape neither expansion nor the corruption that followed expansion." *Id.* at 524.

38. *See id.* at 509-10.

39. For example, "'the Roman empire destroyed by force of arms all the republics and free cities,' so that their virtue could never afterwards recover . . . . [T]he loss of virtue in the other peoples helped cause the decline of virtue in the Romans themselves . . . ." *Id.* at 216-17.

40. *Id.* at 464.

41. Pocock explains:

> Once property was seen to have a symbolic value, expressed in coin or credit, the foundations of personalty themselves appeared imaginery or at best consensual: the individual could exist, even in his own sight, only at the fluctuating value imposed upon him by his fellows, and these evaluations, though constant and public, were too irrationally performed to be seen as act of political decision or virtue.

Id.

cash wealth, is the source of status.[42] In a society based on property, social, economic, and political relations are secure and are guided toward fulfilling the public good. But in a commercial society, passionate pursuit of the market's fortunes replaces universal virtue in directing the citizens' conduct.

The United States in the late eighteenth century seemed particularly well-suited to overcome the threats of corruption that plagued the republics of history. A seemingly endless supply of land promised virtue for generations to come.[43] The absence of social rank and the lack of a developed credit system offered a foundation for an economy based on land and equality. For the new nation, republican principles offered a meaningful and feasible vision of sovereignty.

B. *The Empire*

Imperial sovereignty is very different from republican sovereignty. It is based on de facto control of people, resources, and commerce.[44] It connotes both military and commercial dominance.[45] Like the republic, the empire depends on its citizens mobilized to work toward a unified public good. However, individuals within the empire are viewed as a resource; they are a source of strength, not a source of authority for the sovereign.

Unlike the republic, the public good of the empire is dynamic and consumptive.[46] It is directed toward securing the commercial and military power of the empire as a whole, and exploiting "rewarding establishments" beyond its borders.[47] This public good exists apart from the people; it is not determined by them. Rather, it is the object toward

---

42. In the 18th century

> [t]he landed man . . . was permitted the leisure and autonomy to consider what was to others' good as well as his own; but the individual engaged in exchange could discern only particular values—that of the commodity which was his, that of the commodity for which he exchanged it. His activity did not oblige or even permit him to contemplate the universal good as he acted upon it, and he consequently continued to lack classical rationality.

Id.

43. *Id.* at 535.

44. *See generally* R. KOEBNER, *supra* note 13, at 1-60 (describing the etymology and use of the term "empire" from the time of the Romans until Great Britain in 1700). By the 18th century, "empire" to Britain was commerce. A commercial empire meant "'inexpensive power' which is 'unencumbered with the bulk immense of conquest' and, therefore, intrinsically superior to the 'huge empires' of the past which 'fell self-crushed'." *Id.* at 82.

45. *Id.* at 82-83.

46. *Id.* at 74.

47. *Id.* at 87.

which the sovereign manages the people through law. Unlike the republic, the empire can tolerate intermediate associations between itself and the people, as long as these associations do not detract from its power.[48] The empire is a machine, "modelling the people into various orders,"[49] with the orders subordinated and manipulated by the sovereign to achieve the imperial object[50]—the preeminence and independence of the imperial economic, political, and military system as a whole.

Given the empire's dependence on hierarchy and commerce, the function and nature of property differs greatly from its role in the republic. In an empire, rules of property encourage and support commercial and economic growth. Property is not absolute or equally distributed. Rather, like anything else of value, property must be saleable and capable of stirring economic activity.

Expansion is necessary to the physical survival of an empire. Without expansion, the empire will exhaust its resources and be forced to turn to other nations for theirs. The empire's survival and success in expanding are threatened by two related obstacles: external threats and unprofitable expansion. Other nations may threaten the empire if they control resources that the empire needs, or if they try to conquer the resources that the empire holds. To overcome these external threats, the empire must develop its military and commercial strength so that it can acquire and secure necessary holdings. But expansion to unprofitable markets and to areas that cannot be secured economically or militarily can drain the strength of the empire. In expanding to new areas, the empire must ensure that the economic advantage of securing the territory justifies the expense of doing so.

The frontier, therefore, is a compelling force behind the empire. It represents at once the promise of future expansion and development and the threat of incomplete control. As long as there is a frontier, the empire must expand to secure access to people, land, and resources. But once the frontier is exhausted, the empire is vulnerable to economic dependence on other nations because it no longer controls the resources and labor that it needs to sustain itself. The empire, like the republic, is faced with an impossible task: if the empire expands to unprofitable terri-

48. Interestingly, colonial self-government was not in principle destructive of empirical authority. However, once the colonies pursued independence, their self-rule threatened Britain's authority. R. KOEBNER, *supra* note 13, at 92-93.

49. *Id.* at 87. For example, British colonists were restrained in developing industries of their own because the Empire relied on the colonies for raw materials and markets for British goods. *Id.* at 89-92.

50. J. POCOCK, *supra* note 10, at 53.

tory, it exposes itself to the threat of commercial and military domination by other nations; if the empire fails to expand, its established markets will be exhausted and will not support its economic needs. The empire, therefore, must manage its expansion in terms of costs and benefits.

Unlike the republic, the empire is not threatened by diversity and inequality among its citizens.[51] In fact, the empire depends on these qualities. To operate as a machine, the empire must have people to fulfill a variety of roles. Diverse citizens, located throughout the empire, fulfill diverse economic functions within the imperial machine to achieve the public good. The empire, therefore, unites and manages diverse people through centralized management. A condition of this unity, however, is acceptance of the function demanded by the empire, and identification, as a people, with the goal of empire.[52]

Although republican values of independence, liberty, and participatory government drove the fight for independence, the new nation did not reject imperialism per se.[53] Rather, the colonies rejected the role and status to which Britain confined them, as well as the corruption and luxury that Britain represented.[54] In the Constitution, the Founders sought to combine both a republic and an empire in the federalist system.[55] Given its seemingly endless supply of land, the United States was poised to become an expansive land-based republic. This potential for territorial expansion afforded a check against the inevitable corruption of commerce.[56] In founding the new nation, therefore, the United States

51. In the 18th century, one linguist described an empire as an "Etat vaste et composé de plusieurs peuples" (A vast state composed of many peoples). *Id.* at 59-60.

52. For example, in the British Empire of the 18th century, the nation's status as an empire was a source of national self-esteem in which all subjects fulfilling their roles shared. *Id.* at 79-81.

53. "An empire compatible with virtue was a concept very necessary to them [Americans] if they were to accept themselves as what they were by the circumstances of their foundation and prehistory." J. POCOCK, *supra* note 10, at 511; *see also* G. WOOD, *supra* note 11, at 42-43. For the pre-Revolutionary views of Benjamin Franklin, Thomas Jefferson, and Edmund Burke, see R. KOEBNER, *supra* note 13, at 105-18, 217-19, 224.

54. *See* R. KOEBNER, *supra* note 13, at 217; G. WOOD, *supra* note 11, at 43-45; and J. POCOCK, *supra* note 10, at 507-08.

55. The reforms embodied in the Constitution

> permitted the overcoming of the widely accepted limitation which enjoined republics to be of finite size if they would escape corruption; the new federation could be both republic and empire, continental in its initial dimensions and capable of further expansion by means of simple extensions of the federative principle, greatly surpassing the semimilitary complex of colonies and provinces which had extended the Roman hegemony.

J. POCOCK, *supra* note 10, at 524.

56. As long as commerce did not predominate the land-based agrarian economy and society of the republic, the republic could maintain its virtue while accomodating commerce. *See id.* at 532-35.

sought to escape the finitude of the republics of history and the corruption and despotism of an empire.

III. COLONIAL AND EARLY FEDERAL INDIAN POLICIES

The federal judiciary did not address the legal status of Indian tribes until the 1830s.[57] But colonial and federal policies of the eighteenth and early nineteenth centuries established the framework within which Indian law would develop.

A. *Tribal and Federal Rights to Territory*

Colonial and early federal policies were based on the doctrine of discovery. This doctrine, a product of Eurpoean imperialism, was the rule of international law which resolved conflicting land claims of competing imperial powers. It provided that the first European or "Christian" power to discover and settle land had a claim to that land against subsequent European claims. This right of discovery was subject to the indigenous peoples' right to occupy the land. Their right of occupancy existed until extinguished by voluntary cession to or conquest by the discovering sovereign. The right to extinguish indigenous occupancy rights vested exclusively in the discovering sovereign.[58] Britain's claims to territory in North America were based on the doctrine of discovery and passed to the new government after the Revolution. Colonial and early federal policies that followed the doctrine reflect the military and commercial interests of an emerging empire.[59]

British and early federal claims were limited to areas within the secure economic and military control of the government. This restriction was embodied in Britain's Proclamation of 1763.[60] The Proclamation served two purposes: to protect British economic interests and to secure British holdings against threats from the tribes. These aims were to be achieved in two ways. First, the Proclamation restricted British subjects to land east of the Appalachians. This kept colonists close to British markets and ensured that they would not manufacture their own goods, in competition with British goods. In this way, Britain enforced the colo-

57. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); *see also infra* notes 71-102 and accompanying text.

58. *See* Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637, 644-45 (1978) (explaining European roots of discovery doctrine).

59. F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 26-40, 13-16 (1962).

60. *Id.* at 13. The Proclamation of 1763 is printed in DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA, 1759-1791, at 163-68 (A. Short & Doughty eds. 2d ed. 1918).

nies' role as markets for British goods and sources of raw materials for British manufacturers.[61] Second, the Proclamation established a licensing system to regulate commercial and land transactions with the Indians in "Indian Country." Fraudulent land transactions and corrupt trading practices of certain colonists had antagonized the tribes. Because Britain did not have resources to defend the colonies against the tribes, the crown sought to reduce conflicts by regulating white contacts with the tribes. If conflicts were reduced, the military power needed to protect the white settlers also could be reduced.[62]

After the Revolution, the United States had to contend with the tribes as former wartime enemies. Although the tribes fought for the losing side, they had not been conquered and were not subject completely to the control of the federal government.[63] They continued to present a very real threat to the federal government's control of the territory it claimed. Like Britain, the United States sought to encourage tribal passivity through trade and by controlling white contacts with the tribes. These goals were embodied in the Trade and Intercourse Acts.[64]

The imperial values underlying the doctrine of discovery and the Trade and Intercourse Acts continued to define the doctrinal relationship of the tribes and the federal government during the first half of the nineteenth century. In *Johnson v. McIntosh*,[65] decided in 1823, the Supreme Court confronted for the first time the conflict between tribal and federal property rights. Johnson claimed certain land through a devise from his

61. F. PRUCHA, *supra* note 59, at 14, 16. Lord Egremont, Secretary of State for the Southern Department, first proposed an Indian boundary line:

> It might also be necessary to fix upon some Line for a Western Boundary to our ancient provinces, beyond which our People should not at present be permitted to settle, hence as their Numbers increased, they would emigrate to Nova Scotia, or to the provinces on the Southern Frontier, where they would be usefull to their Mother Country, instead of planting themselves in the Heart of America, out of the reach of Government, and where, from the Difficulty of procuring European Commodities, they would be compelled to commence Manufacturs [sic] to the infinite prejudice of Britain.

Id. at 16.

62. *Id.* at 12-20.

63. The United States treated the tribes as if they had been conquered in the first treaties after the war. The treaties were not negotiated and the United States refused to compensate the tribes for losses. The tribes objected to such treatment, believing that the colonies had desired peace. The tribes themselves did not believe they had been conquered. *Id.* at 26-34.

64. *Id.* at 36-45. The first Trade and Intercourse Act was passed in 1790. Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 55, 1 Stat. 137 (1790). It was based on the principles of the Proclamation of 1763: all who traded with the Indians must be licensed; only the federal government could purchase land from the tribes; acts of whites against Indians in Indian Country were made federal crimes. F. PRUCHA, *supra* note 59, at 45-46.

65. 21 U.S. (8 Wheat.) 543 (1823).

father, who had received the land from the Piankeshaw and Illinois Indian nations. McIntosh claimed the same land by grants from the federal government. The government's rights were secured by a grant from the same tribes, made after the grants to Johnson's father. Marshall, writing for a unanimous court, framed this issue as "the power of Indians to give, and of private individuals to receive, a title, which can be sustained in the courts of this country."[66] He opened his opinion by declaring that

> it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government had adopted in the particular case, and given as the rule for our decision.[67]

By that passage, Marshall established that tribal property rights depended on international law, as well as domestic rules of property.

After presenting an exhaustive history of the doctrine of discovery and establishing that the United States accepted its principles,[68] Marshall held the grants from the Indian nations to the elder Johnson invalid because discovery gave the sovereign the exclusive right to acquire Indian title.[69] Responding to arguments that the tribes retained full rights to their territory under rules of international law governing the relations between conquered people and conquering nations, Marshall explained that domestic law did not follow those rules and that the circumstances of the tribes and the interests of the nation justified exception:

> [T]he tribes of Indians inhabiting this country were fierce savages whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible because they were as brave and high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
>
> . . . .
>
> That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule; better adapted to the actual state of things, was unavoidable.
>
> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterward sustained; if a country has been

66. *Id.* at 572.
67. *Id.*
68. *Id.* at 574-88.
69. *Id.* at 604-05.

> acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concommitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensible to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be support by reason, and certainly cannot be rejected by Courts of justice.[70]

Marshall's opinion enforced three sets of imperial values. First, by applying the doctrine of discovery, he supported its underlying goal, namely expanding the domain of the discovering sovereign. Second, by applying domestic rather than international law, Marshall asserted that the federal government was free to govern the tribes to serve its own interests. By respecting the tribes' right to occupy their land, the federal sovereign could encourage the tribes to remain at peace; by restricting the tribes' right to convey that land to anyone other than the federal sovereign, the government could maintain control over unsettled territory. Finally, Marshall's opinion enforced the principle of de facto power. He defined the tribe's property rights, not by abstract principles, but by the rules that the federal government applied in fact in acquiring Indian territory. The correctness of these rules derived from their assertion, but more importantly from their exercise. As in an empire, the domestic rules of the federal sovereign were determined by its interests and its power. Economic, territorial, and military interests defined the aim of domestic law, but the nation's strength and capacity to apply the law determined its extent.

B. *Tribal, Federal, and State Sovereignty*

The imperial nature of the tribes' relationship with the federal government was developed further in Marshall's opinions in *Cherokee Nation v. Georgia*,[71] decided in 1831, and *Worcester v. Georgia*,[72] decided one year later. In these cases, also known as the *Cherokee Cases*, the Court developed its first comprehensive definition of the relationships between the states, the tribes, and the federal government. Although Marshall wrote the majority opinions, the opinions of the other justices also

70. *Id.* at 590-92.
71. 30 U.S. (5 Pet.) 1 (1831).
72. 31 U.S. (6 Pet.) 515 (1832).

are important because they reflect the force of republican and imperial values and the variety of forms that those values took.

In the *Cherokee Cases*, the Cherokee and the state of Georgia both claimed land within the state's borders. Both based their claims on their inherent sovereignty, as well as agreements with the federal government. By two treaties signed late in the eighteenth century, the United States and the Cherokee set the boundaries between the two nations.[73] The United States guaranteed to the Cherokee their territory and undertook an assimilation program so "[t]hat the Cherokee nation might be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters."[74] Approximately five million acres of the land guaranteed to the tribe lay within the borders of Georgia.[75] In 1802 the federal government agreed with Georgia that it would extinguish Indian title to land within the state in exchange for certain land in western Georgia. Until the federal government extinguished Indian title, the state and white settlers were prohibited from encroaching on Cherokee land.[76] In entering this agreement, the federal government assumed that the Cherokee would sell their land voluntarily at about the same rate that white settlers demanded it.[77]

This assumption proved false. By the 1820s the government's assimilation program had worked. Many Cherokee had become herdsmen and farmers and were tied to their land.[78] The unsettled lands beyond the Mississippi River were no more appealing to the Cherokee than to the white settlers who demanded their removal.[79] Georgia pressed the federal government to fulfill its promise and remove the Cherokee from the state.

---

73. Treaty at Hopewell, Nov. 28, 1785, art. 4, 7 Stat. 18, 19, and Treaty of Holston, July 2, 1791, 7 Stat. 39.

74. Treaty of Holston, art. 14, 7 Stat. at 41.

75. Berman, *supra* note 58, at 656.

76. Georgia Cession, April 26, 1802, in 1 AMERICAN STATE PAPERS: PUBLIC LANDS 126 (1832); *see also*, Berman, *supra* note 58, at 656 (quoting 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 729 (1926)).

77. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503 (1969).

78. *Id.*

79. The Cherokee stated, as reported in the case summary,

> that they are fully satisfied with the country they possess; the climate is salubrious; it is convenient for commerce and intercourse; it contains schools, in which they can obtain teachers from the neighboring states, and places for the worship of God, where Christianity is taught by missionaries and pastors easily supplied from the United States. . . . Little is known of the country west of the Mississippi; and if accepted, the bill asserts it will be the grave not only of their civilization and Christianity, but of the nation itself.

30 U.S. (5 Pet.) at 9.

The Cherokee responded by asserting their sovereignty and independence against both the state of Georgia and the United States.[80] Georgia, in turn, asserted its sovereignty over the Cherokee by, among other things, establishing county governments in Cherokee territory, regulating non-Indian contact with the tribe, declaring tribal laws and customs null and void, and extending Georgia law into Cherokee territory.[81] The state, supported by Jacksonian Democrats in Congress and the Executive, denied federal authority to intervene and maintained that the tribe could not exist as a sovereign within the borders of Georgia.

The Cherokee turned to the Supreme Court to uphold their sovereign rights. The tribe's complaint asserted its complete "sovereignty and independence," as recognized in United States treaties with the tribe,[82] and denied the doctrine of discovery, claiming absolute title derived from "the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs."[83] The tribe argued that Georgia was precluded from governing Cherokee territory by its treaties with the federal government, which were the "supreme law of the land" under article VI of the Constitution, and by article I of the Constitution, which vested in the federal government exclusive power to regulate commerce with the Indian tribes.[84]

The Court's opinions in the *Cherokee Cases* analyzed tribal, state, and federal sovereign relationships in two steps. First, *Cherokee Nation v. Georgia* defined the legal relationship between the tribes and the federal government. Second, *Worcester v. Georgia* defined the relationships between the Cherokee and the state of Georgia, and the state of Georgia and the federal government.

In *Cherokee Nation v. Georgia*, Marshall dismissed the Cherokee's claim on jurisdictional grounds because the tribe did not constitute a "foreign state" for purposes of article III of the Constitution.[85] Marshall

80. Berman, *supra* note 58, at 657 (quoting F. PRUCHA, *supra* note 59, at 231).

81. Burke, *supra* note 77, at 503.

82. 30 U.S. (5 Pet.) at 5.

83. *Id.* at 3.

84. 31 U.S. (6 Pet.) 515 (1832).

85. Article III of the Constitution provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming lands under the grants of different

acknowledged the tribe was a "state" because the United States had recognized through treaties that the Cherokee Nation was "as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community."[86] But Marshall denied that the Cherokee was foreign because it was located within territory belonging to the United States. He wrote:

> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. . . .
>
> . . . .
>
> They and their country are considered by foreign nations, as well by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[87]

Marshall compromised. The tribes were states, but not foreign. They were

> domestic dependent nations. They occupy a territory to which we assert title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[88]

Marshall's opinion reflects imperial values in its definition of the federal-tribal relationship. First, he determined that the Cherokee was a state based on imperial criteria: the tribe's capacity to conduct war against the United States, and to control and assume repsonsibility for its members. Like the empire, the federal sovereign respected the tribe's de facto power. Marshall used the same idea of de facto power to conclude the the Cherokee Nation was not foreign to the United States. Because all nations recognized and respected the United States' sovereignty over the Cherokee, the United States enjoyed de facto control over the tribe, relative to foreign nations. Finally, Marshall's opinion reflects the force of imperial principles in the assumption that the federal sovereign could

---

States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

U.S. CONST. art. III, § 2.

86. 30 U.S. (5 Pet.) at 16.

87. *Id.* at 17-18.

88. *Id.* at 17.

incorporate the Cherokee as a distinct state, even though its members differed from citizens of the United States. Like the empire, the federal sovereign could extend its sovereignty over another very different power.

Justice Johnson concurred with Marshall's conclusion that the Court lacked jurisdiction. But he rejected Marshall's conclusion that the Cherokee Nation was a state. He wrote:

> I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our own Indian tribes most generally are.
>
> . . . .
>
> [The Indian tribes] never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered. . . . When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer.[89]

In Johnson's view the Cherokee Nation was not a state because of the character of the people. They were not settled landowners, organized as people in a republic should be. Johnson's definition of "state," therefore, relied in part on republican values concerning the character of citizens and the organization of society.

Justice Baldwin's concurrence offers another view of how republican and imperial imagery informed the justices' visions of sovereignty and statehood. Baldwin upheld federal assertion of the "right of soil, sovereignty, and jurisdiction, in full dominion" in tribal lands, on which the tribes are "occupant, of allotted hunting grounds."[90] But, invoking values of the republic, he denied that the Cherokee could claim sovereignty within the sovereignty of Georgia.

> [Georgia's] jurisdiction over the territory in question is as supreme as that of congress over what the nation has aquired by cession from the states or treaties with foreign powers . . . . Within [Georgia's] boundaries there can be no other nation, community, or sovereign power, which this department can judicially recognize as a foreign state, capable of demanding or claiming our interposition, so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia . . . .[91]

Baldwin, therefore, viewed the federal sovereign as an empire, capable of

89. *Id.* at 21-22.
90. *Id.* at 40.
91. *Id.* at 47.

accommodating the states as sovereigns, and the tribes as distinct communities of hunters. He viewed the states as republics, incapable of tolerating distinct communities within their borders.

Justice Thompson wrote the only dissenting opinion. In concluding that the Cherokee was a foreign state, he invoked a republican definition of sovereignty.

> The terms state and nation . . . imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state.[92]

Despite the effect of the doctrine of discovery, which necessarily brought the tribes within the territory of the United States, Thompson held that the Cherokee was foreign because

> [i]t is the political relation in which one government or country stands to another, which constitutes it foreign to the other. The Cherokee territory being within the chartered limits of Georgia, does not affect the question. . . . It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those Indians.[93]

The Cherokee dispute with Georgia returned to the Court in *Worcester v. Georgia*. Worcester, a citizen of Vermont, was a missionary who had lived among the Cherokee and been arrested under one of the Georgia statutes regulating white contact with the tribe.[94] Jurisdiction of the Court was founded on diversity of citizenship. In practical terms, the question before the Court was whether Georgia possessed sovereign authority over the Cherokee. Marshall defined the question as, "the validity of the treaties made by the United States with the Cherokee Indians" and "the validity of a statute of the state of Georgia, 'on the ground of its being repugnant to the constitution, treaties and laws of the United

92. *Id.* at 52-53 (citations omitted).

93. *Id.* at 55.

94. 31 U.S. (6 Pet.) at 537-38; *see also* Burke, *supra* note 77, at 519.

States . . . .' "[95] Marshall reaffirmed first federal jurisdiction over tribal territory through the doctrine of discovery,[96] and then found that by treaties with the tribe, "the United States contemplate[s] the Indian territory as completely separated from that of the states . . . ."[97] Marshall concluded by writing:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.[98]

The way in which Marshall framed the issue in the case— whether Georgia violated federal law and the Constitution— determined his analysis. Because federal treaties recognized Cherokee sovereignty and guaranteed to the Nation its land, Georgia's acts were "repugnant to the constitution, treaties and laws, of the United States."[99] Marshall did not base the tribe's sovereignty on its political capacity. Rather, Cherokee sovereignty was the law of the federal sovereign. Marshall's opinion suggests that the federal sovereign, like the empire, defines the rights and status of its holdings.

Justice McLean entered a concurring opinion that also demonstrates the imperial dimensions of federal sovereignty, as well as the republican nature of state sovereignty. McLean upheld the Cherokee's right to self-government simply because it was the policy of the federal government to do so. Relying on the notion that sovereignty constituted de facto control over territory, McLean wrote:

> A state claims the right of sovereignty, commensurate with her territory; as the United States claim it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.[100]

As long as the tribes did not offer the federal sovereign "cause" to deny

95. 31 U.S. (6 Pet.) at 541.

96. *Id.* at 543-49 (explaining the history of European discovery of North America and the descent of American claims from those of Britain).

97. *Id.* at 557.

98. *Id.* at 561.

99. *Id.* at 562-63.

100. *Id.* at 591.

their natural rights, territorial and treaty rights would be respected. Ultimately, however, tribal rights were a matter of federal policy, not right.

> The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . It is a question, not of abstract right, but of public policy. . . . [A] sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities.[101]

McLean suggested that amalgamation of the tribes would serve the political welfare of the state, presumably by supporting a homogeneous and unified populace, because the

> existence [of a tribe] within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.[102]

Though Marshall's opinion was an apparent victory for the Cherokee, it offered the tribe no basis for protection from hostile federal policies that arose throughout the remainder of the century. Tribal sovereignty, according to Marshall, necessarily depended on an act of recognition by the federal sovereign. The converse of this power to recognize and protect tribal sovereignty was the power to deny and destroy it.

Despite Marshall's opinions upholding the tribes' right to self-governance and territorial integrity, President Andrew Jackson refused to enforce them.[103] Jackson maintained that the tribes within states were subject to the states' sovereignty, and that the federal government had no authority to interfere.[104] The President recognized the tribes' right to self-government, but believed that it could be exercised only outside of state territory.[105] In 1830 Congress passed the Removal Bill[106] to enforce this position.

---

101. *Id.* at 593.

102. *Id.* at 594.

103. Upon learning of the Court's opinion, President Jackson supposedly responded, "John Marshall has made his decision, now let him enforce it." Burke, *supra* note 77, at 524-25.

104. *Id.* at 504.

105. Consistent with his support of states rights and westward expansion, Jackson believed that the only solution for the tribes was to move outside of the states within which they resided. "The Cherokees had no right to set up an independent nation within the limits of Georgia, and the President had no authority to interfere with the internal legislation of one of the states of the Union." *Id.*

106. Act of May 28, 1830, ch. 148, 4 Stat. 411.

Under the Removal Bill, the President, without consulting the Senate, could make treaties with the tribes to remove them from land within states to unsettled land west of the Mississippi River. Recognizing the disparate values of the land ceded and the land gained by the tribes, the federal government promised to compensate the tribes with annuity payments. The treaties offered also federal money and support to "cause" the tribes' removal.[107] In many treaties, the tribes conceded that they depended on the federal government for protection and were subject to its jurisdiction. In exchange, the United States guaranteed the tribes' rights to self-government.[108] This policy assumed the tribes removed to new territory would become sufficiently civilized to live among white settlers by the time the country expanded to the Indian territory. Ultimately, the Removal Policy sought to destroy the tribes as sovereigns and assimilate tribal members.[109]

The Removal Policy and the judicial decisions of the period reflect the imperial values underlying Marshall's opinions in the *Cherokee Cases*. The Removal Bill vested in the President extensive power to manage the tribes according to the land and resource needs of the nation. Furthermore, in enforcing the Removal Policy, the judiciary identified tribal sovereignty so closely with federal policy that tribal rights depended entirely on the terms of the treaties effecting their removal. But during this same period, republican values defined the relationship of the tribes and individual tribal members to the states. Both Congress and the president, in enacting and applying the Removal Bill, and the courts, in enforcing it, viewed the states as republics that could not tolerate the tribes and individual tribal members.

This view of the states is reflected in *United States v. Cisna*,[110] decided by a federal circuit court in 1835. Cisna, an Indian, was charged

107. For example, the Treaty with the Seneca and Shawnee, 7 Stat. 351 (1831), contained the following grant in article II:

> In consideration of the cessions stipulated in the foregoing article, the United States agree to cause the said band of Senecas and Shawnees, consisting of about three hundred souls, to be removed in a convenient and suitable manner to the western side of the Mississippi River, and will grant by patent, in fee simple to them and their heirs forever, as long as they shall exist as a nation and remain on the same, a tract of land . . .

Id. at 352. In article VIII, the United States promised to sell the land vacated by the tribe to the public and invest the proceeds in a trust fund, the return of which in part, was to be distributed to the tribe. *Id.* at 352-53.

108. *See e.g.*, Treaty with the Choctaws, 1830, arts. IV-V, 7 Stat. 333-34 (1830).

109. R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 50-51 (1980).

110. 25 F. Cas. 422 (C.C.D. Ohio 1835) (No. 14,795).

with stealing a horse on the Wyandott reservation in Ohio. The federal government claimed jurisdiction over the crime under the Trade and Intercourse Act of 1802.[111] Cisna and the state challenged the jurisdiction of the federal court, claiming that the Trade and Intercourse Act, as applied to the Wyandott, infringed the state's sovereignty. They reasoned that, because the tribe was located within the state and tribal members interacted constantly and successfully with whites, the tribe had become part of the state and subject to its jurisdiction and sovereignty.

The Court agreed, holding that the Act did not apply because the Wyandott, and Cisna in particular, were so civilized that they had become part of the state polity. In its reasoning, the Court disclosed its visions of federal and state sovereignties:

> [C]ertain political relations exist growing out of treaties between the federal government and almost every distinct tribe of Indians within our national limits. These relations may be extended by treaties as far as a sound policy, in the discretion of the treaty making power shall admit, where the Indians reside beyond the limits of a state; but within those limits neither the treaty making power nor the legislative power can be exercised so as to abridge the rights of a state.
>
> Congress can exercise no power on this subject, beyond that of regulating commerce with the Indian tribes. . . . [Such regulations] shall preserve those tribes from an indiscriminate commercial intercourse with our own citizens; such is their inferiority in the business of commerce while in an uncivilized state, that their interests would be sacrificed, if left to an unrestricted intercourse.[112]

The Court's view of the state as a republic is reflected in its use of images of property, independence, and the tribe's similarity to white people to support its conclusion that the tribe was subject to state jurisdiction.

> The Wyandotts have made rapid advances in the arts of civilization. Many of them are very intelligent; their farms are well improved and they generally live in good houses. They own property of almost every kind, and enjoy the comforts of life in as high a degree as many of their white neighbors.
>
> . . . .
>
> [The Trade and Intercourse Acts] are wholly unsuited to the condition of the Wyandott tribe, and it would be impossible to give them a practical operation.[113]

State authority over the tribes depended on the actual similarity of tribal members to the citizens of the state. Like the republic, the state

111. 2 Stat. 139 (1802).
112. 25 F. Cas. at 424.
113. *Id.*

could incorporate tribal members who shared the customs, habits, and values of the original polity. But, as long as tribal members remained uncivilized, they were not a part of the state polity and were subject to the sovereign control of the federal government. The federal government, like the empire, could incorporate the tribes and manage them, regardless of their degree of civilization.

C. *Summary*

Early Indian law cases demonstrate that the judiciary invoked images of the empire and the republic to define the rights and relationships of the tribes, the federal government, and the states. Federal power over the tribes was imperial. It derived from the fact of its exercise, as recognized in *Johnson v. McIntosh*, and from treaties with the tribes, as recognized in the *Cherokee Cases*. As *Cisna* demonstrates, the judiciary viewed the states as republics, unable to incorporate or govern tribal members and tribes unless they were similar to the residents of the states. This structure supported the nation's territorial expansion by vesting in the federal government exclusive power to determine tribal rights to sovereignty, land, and resources, and to limit or deny those rights as the interests of the developing empire demanded.

IV. FEDERAL INDIAN POLICY 1860-1934

By the middle of the nineteenth century, the United States began to realize its dream of a continental empire. Early transportation and communication technologies tied the nation together physically; developing national corporations and industries tied the nation together economically; the Union's victory in the Civil War maintained the nation politically.[114] As economic and political issues developed on a national rather than local level, the federal government expanded to address those issues inappropriate for state-by-state regulation.[115] Realization of a continental empire signalled the exhaustion of the frontier. Like an empire, the United States needed to expand its markets to support itself. In search of new markets, the United States pursued an extra-continental commercial empire.[116] But this overseas expansion depended on a strong economic

114. For accounts of the economic and social changes during the second half of the 19th century, see W. LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898 (1963) and R. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967).

115. R. WIEBE, *supra* note 114, at 185-89.

116. W. LAFEBER, *supra* note 114.

> Two important features distinguished [the new empire] from the old. First, with the

and political base at home.[117] As the empire developed, capital and economic and political power became consolidated in national institutions such as the federal government, large corporations, and political interest groups. These new institutions threatened the republican values of local autonomy, equality, and liberty on which domestic strength and stability depended.[118] To maintain those values, the government imposed regulations to ensure competition in the marketplace and to stablize the economy and society.[119] But with the supply of land dwindling, federal power growing, and the economy shifting from agriculture to industry and commerce,[120] classical republican notions of land-based independence and governance no longer applied. By the twentieth century, classical values of independence and governance gave way to values of wealth, investment, and federal government control that were consistent with the new economy and system of government.

This new world changed the relationship between the states and federal government, and the judiciary's visions of those sovereignties. Federal power was viewed in increasingly imperial terms as it expanded to address more issues. States were losing the absolute power characteristic

---

completion of the continental conquest Americans moved with increasing authority into such extracontinental areas as Hawaii, Latin America, Asia, and Africa. Second, the form of expansion changed. Instead of searching for farming, mineral, or grazing lands, Americans sought foreign markets for agricultural staples or industrial goods.

Id. at 1.

When in the 1880s many Americans feared that [the Western] frontier was closing, they reacted in the classic manner of searching farther west for new frontiers, though primarily of a commercial, not landed nature. This swept them into the Pacific and Asiatic area and hence into one of the maelstroms of world power politics.

Id. at 11.

117. To support international commercial expansion, American intellectual leaders demanded a stable and prosperous American continent to serve as a springboard for conquests beyond the seas. . . . On the one hand, they wanted a new empire to solve domestic problems of crisis proportions. On the other hand, they realized that only a nation which was spiritually, economically, and politically sound could create and maintain such an empire.

Id. at 101.

118. *Id.* at 45-47. Progressives were concerned with controlling the excesses of urbanization and industrialization, and with the decline of community autonomy:

The sweep of reform represented by these [early] movements sought to preserve individualism and democracy, as their adherents understood the terms, by protecting America's communities. . . . [Their] proposal[s] attempted to place power in the hands of small, familiar groups under the dual assumptions that it had once resided there and that a good society required its return.

R. WIEBE, *supra* note 114, at 74.

119. W. LAFEBER *supra* note 114, at 219-23.

120. *Id.* at 11-13.

of republics, as federal authority reached into traditional state matters. But republican values persisted to maintain the political stability of the nation.

Developments in Indian law during this time reflect these changes. The federal government assumed exclusive authority over the tribes and their members, even when they were located within states. But the tribes were not excluded from state jurisdiction because of their republican incapacity, as they had been under the Removal Policy. Rather, they were excluded because under federal law, they were declared to be a federal matter. Yet, ironically, the judiciary invoked republican rhetoric to exclude tribes and tribal members from the federal political community.

During this period the federal government pursued two policies to assimilate the tribes and their members. First, in the 1840s and 1850s, the government undertook the Reservation Policy.[121] Through a series of treaties with various tribes, the federal government created reservations to which the tribes were confined by law. These reservations worked as institutions for assimilating the Indians by rewarding "civilized" behavior and outlawing tribal practices and customs.[122] Dissatisfied with the progress of the Indians under the Reservation Policy, the government adopted the General Allotment Act in 1886.[123] This Act authorized the President to allot reservations into private lots[124] and to declare as citizens those Indians receiving allotments.[125] Allotted lands were held in trust by the federal government for a period of years, during which time tribal members were expected to learn how to manage and maintain their new private property.[126] Both the Reservation and Allotment Policies supported the overseas empire and domestic stability by making more land available for white settlement, assimilating Indians into the national economic and political systems, and eliminating the social and political unrest associated with the tribes by confining the tribes and controlling their contacts with whites.

These policies and the judicial decisions made while they were in force reflect an interesting mix of republican and imperial values and demonstrate how republican principles actually supported and strength-

121. *See* Washburn, *The Historical Context of American Indian Legal Problems*, in AMERICAN INDIANS AND THE LAW 17 (L. Rosen ed. 1976).

122. *Id.* at 12, 17.

123. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-58 (1982)).

124. *Id.* § 1, at 388.

125. *Id.* § 6, at 390.

126. *Id.* § 5, at 389.

ened the imperial character of the federal sovereign. Under the Reservation Policy, republican principles of land-based independence and capacity continued to determine an Indian's civil status. Under the Allotment Act, citizenship, or membership in the polity, was tied directly to ownership of land. Private property was to be the instrument that would convert tribal members into independent citizens prepared to participate in white society. But the opinions and policies of this period reflect also principles of the empire. First, the status of the tribes and their members depended entirely on the laws of the federal sovereign. Second, under the Allotment Act, the federal government managed the tribes and their resources, as an empire would, to serve its own national policy goals. Third, in exercising its protective authority over tribal resources, the federal government enforced imperial economic values to generate income and wealth for the tribes. By the early twentieth century, tribal land and resources were managed as commodities and investments, not as the source of republican independence and virtue contemplated under the Allotment Act. Finally, both policies extended federal power into Indian territory within states. The federal sovereign aggrandized its centralized power over land, resources, and people at the expense of state power. Ironically, the judiciary used republican principles to support imperial power by using the tribes' dependency to justify federal authority over them.

A. *Treaties and Citizenship*

The treaties of the Reservation Period expanded federal control and governance of Indian country through educational programs, Indian agents, and military supervision. In 1871, Congress decreed that the tribes no longer were sovereign nations by declaring "[t]hat hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[127] Instead Congress could legislate directly for the tribes. Although the tribes continued to exist and were recognized under federal law, they did not represent sovereign nations. Rather, the tribes were self-governing communities, distinguished by their collective dependence and incapacity.

United States v. Tobacco Factory,[128] called *Cherokee Tobacco*[129] on

127. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. §§ 71-88 (1982)).

128. 28 F. Cas. 195 (D.C.W.D. Ark. 1870) (No. 16,528).

129. 78 U.S. (11 Wall.) 616 (1870).

appeal to the Supreme Court in 1870, demonstrates that the courts viewed federal power in increasingly imperial terms. These decisions concerned a conflict between an Indian treaty and a later congressional act. The Internal Revenue Act of 1868[130] taxed alcohol, tobacco, and tobacco products "produced anywhere within the exterior boundaries of the United States."[131] But the federal government had exempted Cherokee agriculture and industry from federal taxation in an earlier treaty.[132] Based on that treaty, a member of the tribe challenged the validity of taxes imposed on activities within Cherokee territory.

Both courts held the tax applied to the Cherokee despite the promise of the treaty. The Supreme Court's opinion analyzed the Cherokee's claim in two steps. First, it held that Indian territory indisputably was within the territorial limits of the United States and within the terms of the Act.[133] Second, it analyzed whether the treaty survived the revenue legislation. The Court's analysis reveals an imperial view that the sanctity of a treaty commitment depends on whether, in the sovereign's judgment, the treaty would serve its interests.

> Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory [than treaties with other entities]. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.[134]

The opinion of the district court, affirmed by the Supreme Court, offers another view of imperial values underlying the federal-tribal relationship:

> It must be confessed that the language of some of these treaties is well calculated to flatter the pride of the Indian tribes, and give them a very erroneous notion of the actual legal relation they sustain to the national government. . . . The power of the national government over the Indian tribes and the territory occupied by them, within the constitutional limits of

130. Internal Revenue Act of 1868, ch. 186, 15 Stat. 125.
131. *Id.* § 107, at 167.
132. Treaty with the Cherokee Indians, July 19, 1866, art. 10, 14 Stat. 799, 801.
133. 78 U.S. (11 Wall.) at 619.
134. *Id.* at 621.

> municipal legislation is plenary. To what extent this power will be exercised rests in the sound discretion of congress, limited only by those considerations of policy and humanity that have always marked the action of the government in its treatment of these people.[135]

Cherokee Tobacco strengthened the ability of the federal government to manage the tribes as it wished. Like an empire, the government was not bound by treaties that did not serve its interests and could nullify them with legislation. The 1871 Act, which declared that the United States would no longer conduct treaty relations with the tribes, affirmed this power with positive legislation.[136] Control of the tribes was now complete under federal law. The federal sovereign could govern the tribes according to its policy agenda, free from concern about treaties and tribal consent.

Despite the strength of imperial ideology in these opinions, federal courts still invoked visions of the republic to define the relationship of the federal sovereign to the tribes and their members. In a series of cases decided in the 1870s and 1880s, the judiciary articulated the relationship of the tribes and their members to the federal government in republican terms of independence and capacity. These opinions reveal that the judiciary viewed the federal sovereign as both an empire and a republic. Like an empire, the federal sovereign incorporated and governed the tribes as distinct communities, regardless of their members' independence or degree of civilization. But like a republic, the federal sovereign rejected the tribes and their members as part of the federal body politic.

The Supreme Court's opinions in *Ex parte Crow Dog*[137] in 1883 and *Elk v. Wilkins*[138] in 1884 exposed these republican dimensions of the federal sovereign. *Crow Dog* involved a conflict between federal and tribal jurisdiction over an intra-tribal crime committed within Indian territory. The Court's opinion denying federal criminal jurisdiction reflects the strength of republican imagery in defining federal authority:

> [The law] is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of

135. 28 F. Cas. at 196.
136. *See supra* note 127 and accompanying text.
137. 109 U.S. 559.
138. 112 U.S. 94.

> the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[139]

Justice Matthews invoked republican rhetoric to define the relationship of tribal members to the federal sovereign also:

> [Tribal members] were . . . to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society.[140]

The Court denied that the federal sovereign had criminal jurisdiction over intra-tribal crimes committed in tribal territory because the Indians were different from white people and could not live under the same laws. They differed from the members of white society, because they were dependent and uneducated.

Elk v. Wilkins considered whether Indians were citizens of the United States.[141] The Court used rhetoric similar to that in *Crow Dog* to deny that Indians born into a tribe could become citizens without an Act of Congress. John Elk was born into a tribe, but he had "severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States."[142] He claimed that by leaving his tribe and living as a white person, he had become a citizen and was entitled to vote under the fifteenth amendment.[143]

The Court considered first whether birth into an Indian tribe constituted birth "subject to the jurisdiction" of the United States, as the four-

---

139. 109 U.S. at 571.

140. *Id.* at 568-69.

141. 112 U.S. 94; *see also* McKay v. Campbell, 16 F. Cas. 161 (D.C.D. Or. 1871) (No. 8,840); United States v. Elm, 25 F. Cas. 1006 (D.C.N.D. N.Y. 1877) (No. 15,048) (lower court cases considering Indian citizenship).

142. 112 U.S. at 98.

143. "The right of citizens of the United States to vote shall not be denied by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

teenth amendment provides.[144] The Court held that because Elk was born into a tribe, "an alien, though dependent, power," he owed "direct and immediate allegiance" to the tribe, and was not a natural born citizen.[145] The Court considered next whether Elk became a citizen by renouncing his tribe. In effect, the issue was whether his status was determined by his actual condition, or by his legal status. Earlier cases, such as *Cisna*[146] and *Dred Scott*,[147] had suggested that the status of Indians depended on their relationship to their tribes and their actual similarity to white people. But the Court in *Elk* held that Elk's actual condition did not determine his status because "the alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States Congress."[148] Particularly persuasive to Justice Gray was a treaty with the Seneca and others that conferred citizenship on members deemed to be educated and self-sufficient. The treaty reconstituted the tribe with Indians who "remained in the tribal condition," "orphans," "incompetents," and those likely to become public charges.[149] In accepting this definition of the tribe, Gray implicitly equated tribal membership with republican incapacity. Because the standing naturalization acts did not apply to Indians,[150] the civil status of Indians and membership in the federal polity depended entirely on the discretion of the federal sovereign.

Crow Dog and *Elk* reveal the imperial and republican dimensions of the federal sovereign. Like a republic, the federal sovereign could not annex the tribes, alien and dependent powers, or accept their members, who were dependent and incapacitated, into the federal political community. But the federal sovereign was an empire too. And that sovereign extended its authority over the tribes and their members to define their status and role.

In response to *Crow Dog*, Congress passed the Major Crimes Act[151] which made certain serious crimes between tribal members in tribal terri-

144. "All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

145. 112 U.S. at 102.

146. *See supra* notes 110-13 and accompanying text.

147. In Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856), Chief Justice Taney, in analyzing Black Americans' rights to citizenship, suggested that Indians could become citizens merely by leaving their tribes and living a civilized life.

148. 112 U.S. at 100.

149. *Id.* at 103-04 (citing Treaty of Feb. 23, 1867, 15 Stat. 513, 516).

150. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 155 (1942).

151. Indian Appropriation (Major Crimes) Act, ch. 341, §§ 9, 23 Stat. 362, 385 (1885).

tory punishable in federal court according to federal law. Ironically, the republican concern with dependency, which excluded tribal members from federal citizenship, did not preclude this assertion of federal imperial authority, but rather justified it. This relationship between republican and imperial ideologies was explained in *United States v. Kagama*.[152] Kagama, an Indian, murdered a fellow Indian on a reservation in California. Under the Major Crimes Act, he was to be tried in federal court according to federal law. The Supreme Court heard the case to determine whether the Act violated the state's right to try the case in its own courts under state law. The Court upheld the Act as a valid exercise of inherent authority over the tribes.

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in the [federal] government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[153]

The *Kagama* court emphasized the dependency of the tribes:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.[154]

The Court's conclusion that tribes within states are the concern of the federal government and not the states displays the odd interaction of republican and imperial rhetoric underlying the tribal-federal relationship. The tribes' dependency is the foundation of their relationship to the federal sovereign. Because they are dependent on the federal sovereign, they are not subject to state authority. Furthermore, the states could not be trusted to accord the tribes the treatment they need as dependents. But the Court's opinion suggests an imperial element to federal sovereignty also—the federal government has governed the tribes in fact and the states have not, and it is the only sovereign whose power can govern all

152. 118 U.S. 375 (1886).
153. *Id.* at 384-85.
154. *Id.* at 383-84.

the tribes. The federal sovereign's de facto control of all the tribes, therefore, trumps the state's claim to territorial sovereignty.

By the 1880s, the courts had constructed complex relationships between the tribes, their members, the states and the federal government. Basically, the states were seen as republics unable to govern the tribe and accept their members. The federal sovereign possessed attributes of both the republic and the empire. As a republic, the federal sovereign could not accept the tribe or tribal members as part of its political community. But as an empire, it was uniquely able to govern all the tribes as separate, distinct, and dependent communities. The characteristic which excluded the tribes from the state and federal polities, their dependency, subjected them to the imperial power of the federal empire.

B. *Changing Views of Property and Tribes*

After *Elk* and *Kagama*, Indians faced two legal obstacles to realizing the rights of citizenship: membership in a tribe and individual dependence, presumed from that membership. By the late 1880s, the United States was anxious to assimilate the tribes so that its responsibility as their "guardian" would cease, and the land held by the tribes would be made available to white settlement.[155] Many humanitarians concerned with the condition of the Indians saw assimilation as the only way for Indians to prosper and realize their rights as individuals.[156] Assimilation, however, necessarily implied the destruction of the tribe.[157]

The General Allotment Act,[158] passed in 1887, was designed to eliminate the obstacles of the tribe and the members' dependence by imposing a system of private property on tribal lands and transforming tribal members into independent landowning citizens, prepared to participate in the republic. The Act authorized the president to order reservations allotted into pieces of private property.[159] Each head of a

155. As white settlers pushed westward, the lands guaranteed to the tribes by treaties of the 1830s, '40s, and '50s were invaded by settlers claiming the land for themselves. To reduce conflicts between the tribes and the settlers, the federal government made more land available to whites by reducing the size of tribal holdings. Washburn, *supra* note 121, at 17-18; *see also* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 20-21 (F. Prucha ed. 1973).

156. Washburn, *supra* note 121, at 18-19.

157. "The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in the concepts of property was fundamental in the contrast between the two ways of life." F. COHEN, *supra* note 150, at 208; *see also* D. OTIS, *supra* note 155, at 8-11.

158. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 24 U.S.C. §§ 331-58 (1982)).

159. The General Allotment Act provided:

household could select an allotment for her or his family.[160] Title to the allotments was to be held in trust by the federal government for a period of years, when title would pass to the individual.[161] Upon receiving allotments, Indians could be granted citizenship and become subject to the civil and criminal jurisdiction of the state in which their land was located if they "adopted the habits of civilized life."[162] The surplus land remaining after allotment was sold to white settlers by the government. The proceeds of these sales were held in trust for the tribe with income to be paid to tribal members. Although the Allotment Policy was designed to destroy the tribal structure, the tribes continued to exist until Congress terminated them by legislation.[163]

In fact, the General Allotment Act failed to assimilate Indians into white society as independent individuals.[164] Although many Indians became citizens under the Act, and every Indian was made a citizen by the Indian Citizenship Act of 1924,[165] the tribes remained communities distinguished from white society and the national economy. In addition to cultural differences, the tribes were distinguished by their dislocation and poverty.[166] By imposing private property on the tribes, the General Allotment Act destroyed the communities and economies that supported tribal members.[167] Furthermore, the General Allotment Act weakened the tribes as governments by intruding federal power into internal tribal affairs. Although the Allotment Act did not destroy the doctrine of tribal

---

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservations in severalty to any Indian located thereon . . . .

Id. § 1, at 388.

160. *Id.* § 2, at 388 (codified at 25 U.S.C. § 332 (1982)).

161. *Id.* § 5, at 389 (codified at 25 U.S.C. § 348). Under the Allotment Act, land was held in trust for 25 years; however, the president could unilaterally extend the trust. *Id.*

162. *Id.* § 6, at 390 (codified at 8 U.S.C. § 1401).

163. Because tribal existence was a political matter, so was tribal destruction. From the perspective of the federal government, the tribes continued to exist until the policy which recognized them changed.

164. *See generally* D. OTIS, *supra* note 155, at 124-55 (describing the results of the Allotment Program).

165. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (1982)).

166. A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 336 (1970).

167. G. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM 5-7 (1980).

self-governance, it implicitly vested in the federal government many powers central to tribal self-government. In the name of enforcing the Act, federal authority in the form of the Bureau of Indian Affairs, superseded tribal authority over issues such as tribal consent to law suits, tribal membership, and land tenure and use.[168] As the impoverishing effects of allotment became apparent in the 1920s and 1930s, federal authority over the tribes and individual tribal members expanded because of their increased need for protection and support. By the 1920s, the tribe, as an incompetent and dependent community, was the institution through which the federal government maintained control of the tribal members and resources.

The decisions of the late nineteenth and early twentieth centuries retained the republican and imperial rhetoric of the Reservation Period. Republican principles of dependency continued to justify exclusive federal control of the tribes, their members, and resources. But imperial values emerged to redefine the character and function of property and to guide federal activities. Under the General Allotment Act, private property was supposed to support tribal members in the tradition of republicanism. But in the early twentieth century, the judiciary no longer viewed property as the source of republican independence and status. Rather, property was viewed an investment, or a commodity to generate wealth and income for the tribes and tribal members. And federal authority was exercised to generate wealth for the tribes, while at the same time, serving federal economic and resource interests.

The Court's opinions in *Lone Wolf v. Hitchcock*[169] and *Tiger v. Western Investment Co.*[170] demonstrate how the republican values embodied in the Allotment Act were being replaced with the imperial values which supported the commercial expansion of the nation. In *Lone Wolf*, the confederated tribes of the Kiowa, Comanche, and Apache sought to enjoin the federal government from allotting their reservation. The tribes claimed that, under the Medicine Lodge Treaty of 1867, the federal government needed to secure the consent of three-fourths of the adult males before alloting the land.[171] Three-fourths of the tribes had not consented to the allotment.

The tribes argued that allotment constituted a taking within the

168. *See, e.g.,* Cherokee Nation v. Stevens 174 U.S. 445 (1889); *see also* Cherokee Nation v. Hitchcock 187 U.S. 294 (1902).

169. 187 U.S. 553 (1903).

170. 221 U.S. 286 (1911).

171. Medicine Lodge Treaty, Oct. 21, 1867. art. 12, 15 Stat. 581, 585.

meaning of the fifth amendment,[172] specifically, a taking of their right to communal ownership. They claimed that, by the treaty they were

> vested with an interest in the lands held in common within the resevation, which interest could not be divested by Congress in any other mode than that specified in [the treaty], and that as a result of the said stipulation the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States, and such interest . . . came under the control of the judicial branch of the government.[173]

The Court rejected the tribes' claim, invoking familiar images of republican dependency to deny that they had a complaint against the United States,[174] and doctrine reaffirming the imperial power of Congress to abrogate Indian treaties which did not serve national interests.[175] The Court denied finally that allotment effected a taking of any property right, relying on an imperial vision of property. "[T]he action of Congress now complained of was but an exercise of such [plenary] power, a mere change in the form of investment of Indian tribal property."[176] Significantly, the Court did not uphold the allotment as necessary to civilizing or assimilating the tribes. The republican values underlying the allotment policy never enter the Court's opinion because it viewed property, not as the foundation of republican government, but as an investment that could take many different forms.

The Supreme Court's opinion in *Tiger v. Western Investment Co.* also demonstrates that property was losing its significance as the foundation for republican citizenship. Tiger, an Indian, sued to rescind two land transactions, claiming they were invalid because Congress had restricted his ability to alienate his land.[177] The land companies argued that the restriction on Tiger's land was unconstitutional, inconsistent with his sta-

172. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

173. 187 U.S. at 564.

174. "The contention [of a vested right] in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States." *Id.*

175. Congress's plenary power over the tribes included the power

> to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. . . . [I]t was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy . . . .

Id. at 566.

176. *Id.* at 568; *see also Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

177. Act of Apr. 26, 1906, ch. 1876. §§ 19, 22, 34 Stat. 137, 144-45.

tus as a citizen, and denied him property without due process of law.[178]

The Court rejected the land companies' arguments, relying on the federal government's plenary power over the tribes and its authority to protect them and their property. The Court considered also whether Tiger's citizenship removed him from the protective authority of the federal sovereign:

> "We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges and immunities of citizens, while it retained, for the time being, the title to certain lands, in trust for their benefit, and withheld from them for a certain period the power to sell, lease or otherwise dispose of their interest in such lands. . . . Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being, of the right to alienate it."[179]

This opinion makes clear that citizenship was no longer related to republican independence based on property ownership. Tiger, as a citizen, could participate in the federal political community even though he was not "independent" in terms of the republic. Ironically though, his dependent condition precluded him from participating freely in the marketplace.

As the federal government assumed greater control over the tribes and internal tribal matters, the tribes' governmental powers and political capacity declined in practice and in doctrine. The tribe as a legal concept persisted. But the legal definition of the tribe changed. Tribes no longer were identified by their political relationship with the federal sovereign. Rather, tribes were redefined in republican terms of race, dependency, and difference from white society. The Supreme Court developed this new legal definition of a "tribe" in the 1913 case *United States v. Sandoval*.[180] Sandoval was convicted for selling liquor to the Pueblo Indians of New Mexico in violation of a federal law prohibiting the sale of alcohol to Indians.[181] Sandoval challenged his conviction, claiming that Congress

178. 221 U.S. at 310.

179. *Id.* at 312-13 (quoting Beck v. Flournoy Live-Stock & Real-Estate Co., 65 F. 30, 35 (8th Cir. 1894)).

180. 231 U.S. 28.

181. Act of Jan. 30, 1897, ch. 109, 29 Stat. 506, as supplemented by the Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558.

did not have protective authority over the Pueblos because they were not tribes. The Pueblos differed from other Indians because the United States had not acquired authority over them by the doctrine of discovery or treaties. Rather, Mexico had ceded to the United States the territory of New Mexico and its inhabitants, including the Pueblos.[182] The Pueblos had not made treaties with the United States, nor had they been subject to federal legislative authority. Sandoval argued that because the political relationship between the United States and the Pueblos differed from the relationship between the United States and other Indian tribes, the Pueblos were not tribes. The Court held otherwise:

> The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.[183]
>
> . . . .
>
> [T]he legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.[184]

A community's status as a tribe did not depend on its political relationship to the United States or its governmental power. Rather, the term "tribe" identified a community of people distinguished from white society by their race, their location, and their culture.

C. *Summary*

The Indian law decisions of the late nineteenth century and early twentieth century reflect a change in the relationship of republican and imperial rhetoric. As demonstrated by the *Cherokee Tobacco Cases*, federal power over the tribes was becoming increasingly imperial. The Court and later Congress freed federal power from treaty promises and the treaty making process so the federal sovereign could pursue its own interests unencumbered by obligations to the tribes. But *Crow Dog*, *Elk*, and the General Allotment Act show that republican images continued to

182. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, art. 5, 9 Stat. 922, 926-28.
183. 231 U.S. at 39.
184. *Id.* at 47.

inform the judiciary's view of the political relationship of citizens to the federal sovereign. With the Major Crimes Act, *Kagama*, *Lone Wolf*, *Tiger*, and *Sandoval*, republican dependence took on new significance. No longer was it an obstacle to membership in the federal political community. Rather, it was the justification for extraordinary federal involvement in the activities of tribes and their members. Classical republican values of land-based independence declined as the federal government used property to generate income and wealth for the tribes.

V. MODERN INDIAN POLICY: 1934-PRESENT

The Great Depression and the New Deal legislation which followed forced changes in the role and purposes of government, and in the sovereign relationships of the states and the federal government.[185] By the time of the Depression, the United States had developed a national economy. Industries were regional or national in scope and commerce extended throughout the country. These were supported by national communication and transportation systems.[186] The collapse of the economy, therefore, was a national rather than local catastrophy which called for a national rather than local remedy. In response to the Depression, the national government extended its commerce clause and spending power authority to regulate social and economic issues formerly controlled by local or state governments.[187]

Since the New Deal, federal power has continued to grow in relation to the power of the states. Through bureaucracies built on specialization and expertise, federal power, like imperial power, has managed economic and social matters for the country as a whole. This imperial federal power has challenged the independent sovereignty of the states and forced them to change. State sovereignty has become more centralized, bureaucratic, and imperial in managing affairs within its borders. Although the federal government has dominated the states with social

185. *See* A. EKIRCH, IDEOLOGIES AND UTOPIAS 36-37 (1969); J. PATTERSON, THE NEW DEAL AND THE STATES 198 (1981); Scheiber, *From the New Deal to the New Federalism, 1933-1983*, in THE NEW DEAL LEGACY AND THE CONSTITUTION: A HALF-CENTURY RETROSPECT 1933-83, at 1 (1984).

186. "[S]tates were already being overtaken by the nationalizing of modern economic life [in the 1920s]. . . . [O]nly Congress could regulate railroads, establish nationwide labor standards, curb monopolies and holding companies, and control the increasingly interstate character of commerce." J. PATTERSON, *supra* note 185, at 24-25.

187. Scheiber, *supra* note 185, at 3-5. Such areas included agricultural and manufacturing regulations, labor management, and welfare. For a general comparison of state activities before and after the New Deal, see J. PATTERSON, *supra* note 185, at 3-25, 198-200.

and economic legislation since the New Deal, the states have retained sovereign authority to regulate matters within their police powers, to the extent that such regulation does not interfere with national policies.[188]

In this new system, the states are guided by two visions of imperial power. Under the first, the states are agents of the federal government, capable of administering and enforcing federal policies because of their particular institutional competence to deal with local issues. State governments serve as outposts, administering and enforcing the power of the federal government. Under the second, the states retain and enhance their sovereignty as they exercise more authority under their police powers. To the extent that such state power is independent of the federal government, it is imperial in its centralized and instrumental management of state affairs. The states are "mini-empires," extending their authority to all social and economic matters within their borders.

The changes in the sovereign status of the tribes in federal Indian policy and case law reflect these changes in federal and state sovereignty. Immediately following the New Deal, the United States initiated a new Indian policy, under the Indian Reorganization Act,[189] to remedy problems in Indian country that were identified as national concerns. Under the Act, the United States resurrected the tribe as an economic and political entity capable of representing its members' interests to the federal legislature and bureaucracy, and in the marketplace.[190] The federal government rejuvenated the tribe, as it created New Deal bureaus, to administer and enforce federal programs and policies.

Within this imperial system, republican principles continued to inform images of legitimate government and support the federal-tribal relationship. Tribal governments were structured like the federal and state governments and were based on participatory governance.[191] The federal judiciary continued to use the republican rhetoric of dependency to analyze the relationship of the tribes and their members to the federal and state sovereignties.

Beginning with the Termination Policy of the 1950s,[192] the courts' views of state and tribal sovereignty began to change. They quit using the republican rhetoric of dependency and incapacity and denied the sover-

188. *See* J. PATTERSON, *supra* note 185, at 194-207; Scheiber, *supra* note 185, at 4-6.

189. The Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-78 (1982)).

190. G. TAYLOR, *supra* note 167, at 17.

191. *Id* at 92-97.

192. *See infra* notes 210-13 and accompanying text.

eign status of the tribes. Increasingly, the courts viewed tribes as creatures of the federal government, subject to state authority to the extent that it was not inconsistent with express federal policies. The courts upheld state authority if federal policies recognized the states' particular institutional competence to regulate matters on reservations, or if the states had economic and territorial interests, independent of the federal government, in activities on the reservation. Under the Termination and later Self-Determination Policies,[193] federal sovereignty retained its imperial character while state sovereignty lost its republican character. By the mid-1960s, republican values no longer barred the states from governing tribes and their members.

A. *The Tribes as a National Cause*

In the 1920s, it became evident that the General Allotment Act had failed to transform the American Indian into the independent farmer that had been envisioned in 1886.[194] The *Meriam Report*,[195] a 1928 government-commissioned study, concluded that the Allotment Policy contributed to tribal poverty because "[t]he strength of the ancient system of communal ownership was not realized."[196] The Report called for, among other changes, resurrecting the tribe to replace the Bureau of Indian Affairs as the primary means for governing the tribes.[197]

To address the Report's recommendations, Congress passed the Indian Reorganization Act of 1934.[198] Generally, the Act was designed to foster tribal self-government and economic autonomy. Specifically, this was to be achieved by consolidating tribal land and resource holdings that had been lost or split up by the Allotment Policy, vesting the tribes with authority to manage their land and resources, establishing a revolving credit fund for federally chartered tribal corporations, providing financial support for tribal governments, and encouraging greater Indian

193. *See infra* notes 215-18 and accompanying text.

194. Debo explains:

> For forty years, as tribe after tribe was liquidated and thousands upon thousands of individuals entered, in theory, the general pattern of white life and culture, it had been reported in terms of "progress." Now for the first time deplorable conditions of poverty, disease, lack of social and economic adjustment, suffering, and discontent were uncovered, and the allotment policy was cited as the main cause.

A. DEBO, *supra* note 166, at 288.

195. INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (*Meriam Report*) (1928 & reprint 1971).

196. *Id.* at 460; *see also* G. TAYLOR, *supra* note 167, at 6-8, 14.

197. G. TAYLOR, *supra* note 167, at 17.

198. 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 476-78 (1982)).

employment in the Bureau of Indian Affairs.[199]

Because the Allotment Policy had effectively destroyed most tribal governments by transferring many functions to the federal government, the Indian Reorganization Act included provisions by which tribal governments could be recreated,[200] provided a majority of the residents of a reservation voted to adopt the provisions of the Act and ratified the tribal constitution. If the members of a reservation rejected the Act, the reservation would remain subject to the direct control of the Bureau.[201] The Act also provided that, on petition from at least one-third of the members of a tribe subject to the Act, the tribe could be chartered as a corporation with limited power to manage its resources.[202] The Indian Reorganization Act, therefore, took great steps in recreating the tribes, and investing them with political and economic authority that had been exercised previously by the federal government independent of tribal consent.[203] Although the Indian Reorganization Act represented a great shift in federal Indian policy, it did not break with the goal of assimilation.[204]

The Indian Reorganization Act was based on a mixture of republican and imperial values similar to those underlying Indian policies of the late nineteenth and early twentieth centuries.[205] The Act reflects republican ideology in two ways. As in the past, republican notions of dependency and incapacity justified the federal policies that seemed to favor tribal members or exempt them from state laws. Second, in its commitment to local autonomy, tribal consent, and self-determination, the Act implemented a fundamental republican ideal: the responsibility for government should fall to those who are governed.

At the same time, the relationships of both the federal government and the tribes to the states were cast in imperial terms. Courts upheld tribal sovereignty and exemptions against state challenges, reasoning that the federal government bore a duty to protect the tribes and that this duty, as a federal matter, was superior to the rights and interests of the states. Implicitly, the goals of the Indian Reorganization Act, namely

199. G. TAYLOR, *supra* note 167, at 92-118.

200. 48 Stat. § 16, at 987 (codified as amended at 25 U.S.C. § 476 (1982)).

201. *Id.* § 318 at 988 (codified at 25 U.S.C. § 478 (1982)).

202. *Id.* § 17, at 988 (codified at 25 U.S.C. § 477 (1982)).

203. G. TAYLOR, *supra* note 167, at 92-118.

204. Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 145 (1977).

205. *See supra* notes 114-84 and accompanying text.

tribal economic and political self-determination, were identified as national goals incumbent upon the state and federal governments.

Board of County Commissioners v. Seber,[206] decided in 1943, is representative of opinions under the Reorganinzation Act and reflects the new relationship of the federal and state sovereigns. In *Seber*, Oklahoma challenged the constitutionality of federal statutes[207] authorizing the removal of qualified Indian lands from the state tax rolls, upon application of the landowner. The state argued that these Acts intruded into its authority and diminished its base of taxable land.

In upholding the Acts, the Court first characterized the condition of the Indians as a national problem, one the federal government created and bore responsibility for solving.

> In the exercise of the war and treaty powers, the United State overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.[208]

Next, the Court considered the state's complaint that the Acts diminished its tax base. The Court held that the federal sovereign, like an imperial sovereign, could fulfill its objectives by compromising the interests of the state. Congress was free to balance the interests at stake and to choose the means by which to achieve its end.

> [The Acts] are appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligation of that guardianship. The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts.[209]

Judicial decisions under the Reorganization Act supported federal policies exempting tribes and their members from certain state authority. The federal government undertook those policies to fulfill a duty to the tribes, arising from the government's responsibility for making the tribes dependent. To satisfy that duty, the federal government could limit states

206. 318 U.S. 705.

207. Act of June 20, 1936, Pub. L. No. 74-716, 49 Stat. 1542; Act of May 19, 1937, Pub. L. No. 75-96, 50 Stat. 188.

208. 318 U.S. at 715.

209. *Id.* at 718.

authority over the tribes and their members. National issues took supremacy over state interests as the federal sovereign managed the states and tribes in its own best interest.

B. *Federal Control of State and Tribal Powers*

In the 1950s, opponents within Congress, the Bureau of Indian Affairs (BIA), and the federal judiciary challenged the federal commitment to tribal self-government and economic development.[210] Under the Termination Policy, adopted in 1953,[211] Congress and the BIA undertook a comprehensive program to subject tribal members to state criminal and civil jurisdiction, to transfer responsibility for Indian education and health services to the states, to authorize non-Indians to use and purchase Indian lands, to encourage Indian removal from rural reservations to urban areas, and to discourage tribal economic development. Approximately 109 tribes and bands were terminated during this time.[212] Underlying the Termination Policy was a belief that the special tribal-federal relationship, on which the Indian Reorganization Act was based, was "un-American" and counterproductive of the goal of assimilation.[213] By attacking the special relationship between the tribes and the federal sovereign, proponents of termination implicitly rejected the republican values that justified extraordinary federal protection of tribal governments and economies.

By the late 1960s and early 1970s, Congress was retreating from the Termination Policy. But Congress and the judiciary continued to reject the notion that the United States owed the tribes a duty of protection. Rather, the tribes were increasingly recognized as local governments

---

210. Wilkinson & Biggs, *supra* note 204, at 145-49.

211. In 1953 the House of Representatives passed a resolution which provided in part:

> Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States and to grant them all the rights . . . and prerogatives pertaining to American citizenship . . . it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof [in certain states and in certain tribes]. . .should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians . . . .

H.R., Con. Res. 108, 67 Stat. B132. This resolution, though technically only a policy statement that is no longer binding on Congress, continues to generate political pressure on the tribes. Wilkinson & Biggs, *supra* note 204, at 149-51.

212. A series of 14 acts from 1954 to 1962 effected the termination. Wilkinson & Biggs, *supra* note 204, at 151.

213. *Id.* at 154.

with limited independence from state and local governments.[214] The key to this independence was the tribes' relationship to the federal government. A series of legislative acts passed between 1966 and 1975[215] sought to vest in the tribes and their members civil,[216] governmental,[217] and economic[218] rights that would enhance tribal self-government and economic development, and supplement the Indian Reorganization Act.

During this period of termination and subsequent self-determination, the federal judiciary moved from an analysis premised on the tribes' dependence, to one based on federal and state imperialism. Republican rhetoric of dependency and recognition of tribal sovereignty disappeared from judicial opinions during the Termination Period. Without the limiting principle of republican dependency, which had shielded tribes and their members from state jurisdicition, state authority over tribal affairs expanded greatly.

State authority over tribal land and members is now limited only by federal authority which preempts state regulation. Tribal sovereignty as a doctrine has no force against state and federal jurisdiction. Rather, the federal judiciary analyzes the status and rights of the tribes as if they are creatures of the federal government. State sovereignty in this preemption analysis is conceived in "quasi-imperial" terms. Either the states are exercising powers delegated to them by the federal government, or they are asserting their independent sovereignty over the tribes within their borders. Like an imperial possession, the states enforce the policies and power of the federal empire. Like an empire, the states can tolerate foreign political entities within their borders, and exercise sovereignty over

214. *Id.* at 162-63.

215. For a general outline of these legislative acts, see Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 624-29 (1976).

216. By the Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1982)), Congress granted federal district courts jurisdiction to hear suits brought by tribes themselves without the United States as guardian. The Act of Apr. 11, 1968 (Indian Civil Rights Act), Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 25 U.S.C. §§ 1301-41 (1982 & Supp. 1987)), extended constitutional protections against tribal, state, and federal government actions to tribal members.

217. The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450a-n (1982 & Supp. 1987)), authorized tribes to contract with the secretaries of the interior and health and human welfare to assume responsibility for delivering governmental, health, and education services to tribal members.

218. The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as amended at 25 U.S.C. §§ 1451-1543 (1982 & Supp. 1987)), established a revolving credit fund for tribal economic development.

them. Under both models, the federal government determines the extent of state authority over the tribes.

Tee-Hit-Ton Indians v. United States,[219] is one of the first decisions of the Court during the Termination Period. This case illustrates the decline of republican rhetoric and the notion of a national duty to the tribes. *Tee-Hit-Ton* involved claims by Alaska Natives against the federal government under the fifth amendment taking clause. The Natives were seeking compensation for the value of timber taken by the United States from land which they claimed by Indian title. The United States claimed that because no treaty or act of Congress formally recognized Indian title in Alaska, the Natives had no compensable interest. In analyzing the status and rights of the Alaska Natives, Justice Reed relied on imperial images of sovereign power to hold that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."[220] Reed explained that the nation's expansion required that Congress be free and flexible in managing Indian affairs:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.
>
> . . . .
>
> In light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Goverment-owned land rather than making compensation for its value a rigid constitutional principle.[221]

Although the Indian Reorganization Act was premised on the finding that Indian poverty and dislocation were caused by the policies of the United States, and were the responsibility of the United States to remedy, the Court denied that the federal government was obliged to protect the Natives' property. Rather, like an empire, the federal sovereign could

219. 348 U.S. 272 (1955).

220. *Id.* at 285.

221. *Id.* at 289-91.

formulate Indian policy to serve its own resource and economic interests. During the next two decades, this principle extended to tribal sovereign rights as republican rhetoric and the notion of a federal obligation disappeared altogether.

Williams v. Lee,[222] decided four years later, offered an analysis of tribal and state sovereignty which made clear the imperial relationship between the United States and the tribes, and the developing imperial character of state sovereignty. A federally licensed Indian trader who operated a store on the Navajo reservation sued the defendants, members of the Navajo tribe, in state court to recover money owed to him. After losing in the state courts, the defendant appealed to the Supreme Court, claiming that the tribal courts, not the state courts, had jurisdiction to hear the case.

The Supreme Court ruled in favor of the tribal courts and held that the state violated the tribe's right to self-government by assuming jurisdiction over the case. The Court explained that the tribes originally were "separate nations."[223] However, over the years, the tribes "g[a]ve up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land."[224] Relying on *Worcester v. Georgia*, the Court held, "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[225] The Court emphasized that the relationship between the tribes and the state was a matter of federal policy:

> Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them.[226]

The Court concluded by writing, "If this power [of self-government] is to be taken away from [the tribe], it is for Congress to do it."[227] Tribal sovereignty or self-governance, therefore, was really a matter of federal policy. Because Congress exercised complete control over the tribes, the

222. 358 U.S. 217 (1959).

223. *Id.* at 218.

224. *Id.*.

225. *Id.* at 220. For a discussion of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), see *supra* notes 94-102 and accompanying text.

226. 358 U.S. at 220-21.

227. *Id.* at 223.

powers that the tribe retained or lost were attributed to a conscious policy decision of Congress.

Although most tribes survived the Termination Policy of the 1950s, the threat of termination had stifled economic and political development.[228] Tribes that petitioned the federal government for program funds or money due on land claims might be forced to accept restrictions on their governmental rights and economic authority, or even to accept termination as a condition of receiving their money. Under the Termination Policy, tribes devoted all their resources to political and economic survival and could not focus on political and economic development.[229] By the early 1960s, only tribes with a strong economic base, independent of federal funds, survived as effective governments.[230] But during the late 1960s and 1970s, many tribes began to recover. Under the Great Society Programs, tribes were recognized as local governments eligible to participate in federal programs.[231] The Indian Self-Determination and Education Assistance Act of 1975 also reaffirmed the tribe as the focus for Indian economic development and government.[232] By these programs, the federal government again recognized the tribe as a responsible governing entity. As a result, tribal members began to recognize the tribe as a source of economic support and cultural identity.[233] With support from the federal government and tribal members, tribes have developed economically and and gained greater governmental authority.

Although many tribes have gained some economic and political independence from the federal government, judicial decisions continue to conceptualize tribal economic, governmental, and political authority as creatures of the federal government. Tribal authority is defined by the federal sovereign, acting like an empire, after weighing the federal, tribal, and state interests at stake.

---

228. J. WISE, THE RED MAN IN THE NEW WORLD DRAMA 368-69 (1971).

229. *Id.*

230. The only tribes able to support themselves, "on a significant scale" under the Indian Reorganization Act were the Osage of Oklahoma, who had oil royalities, and the Uintah and Ouray tribes of Utah, who won a $31,000,000 claim against the United States. *Id.* at 382.

231. *Id.* at 381.

232. *See supra* note 217.

233. With responsibility for administering these programs,

> Indian reservations were able to tap an immediate source of strength that they had not previously had access to. A strong sense of tribal identity began to build as people who had long since forsaken the tribe returned to claim membership and regain their place in the reservation communities. The trend of gradual dissipation of young people which had plagued the tribal groups for over a century was reversed. In this aspect the Poverty program was critical in establishing a new sense of identity among Indian people.

J. WISE, *supra* note 228, at 383.

The Court's opinion in *McClanahan v. Arizona State Tax Commission*,[234] decided in 1973, shows how principles of the empire inform current determinations of state, tribal, and federal power. The issue before the Court was whether Arizona could impose its personal income tax on a reservation Indian who earned all her income within the reservation. The Court's opinion first adopted an imperial view of state sovereignty. Justice Marshall wrote, the controversy between the state and the tribe "requires us once again to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations."[235] The Court assumed that a state, like an empire, governed all matters within its borders. State authority over tribes and their members was no longer limited by republican principles. Despite the extent of state sovereignty, the Court held the state tax invalid because it "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves."[236] Although Marshall acknowledged the tribes' history of nationhood and sovereignty independent of state jurisdiction, he wrote:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.[237]

Marshall proceeded to analyze the relevant treaty and statute and found that the government intended to exempt the income of reservation Indians from state income tax. The Court could have cited the broad national commitment to tribal self-government and self-determination, embodied in the Indian Reorganization Act, as the policy which preempted the state tax. Instead, the Court chose to rely on the narrower federal policy exempting tribal members' income from state taxation.[238]

234. 411 U.S. 164.

235. *Id.* at 165.

236. *Id.*

237. *Id.* at 172 (citations & footnotes omitted).

238. *Id.* at 181.

Under this preemption analysis, tribal authority had to be recognized by the federal government by either a long-standing practice or a definitive policy. Otherwise, the tribe was subject to state authority. The tribes' dependency on the federal government, which previously precluded state jurisdiction, no longer limited state authority over the tribes.

The Court's 1980 opinion in *Washington v. Confederated Tribes of the Colville Indian Reservation*[239] clarified the relationships underlying the preemption analysis. All the tribes involved in the suit had developed their own taxing schemes to raise revenue for governmental services. In addition to the tribal taxes, the state imposed three taxes: an excise tax on cigarettes sold to nonmembers; a general retail tax on sales of personal property to non-members; and a motor vehicle excise tax on all tribal vehicles that used state roads. The state conceded that it could not tax intra-tribal sales of cigarettes or personal property, or vehicles used exclusively on the reservation.

The state challenged first the authority of the tribe to impose taxes on non-Indian purchasers. Rejecting this claim, the Court explained that the tribes could tax transactions on the reservation because, under federal policy, the tribes retained the power to tax.

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.
>
> . . . .
>
> [F]ederal law to date has not worked a divestiture of Indian taxing power.
>
> . . . .
>
> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . . .[240]

The tribes' power to tax, therefore, was a power retained under federal law. But like a possession of an empire, the tribes' authority was subject to the federal sovereign and limited by overriding federal interests.

Although the Court upheld the tribes' authority to tax, based on federal policy, it found that the state also had authority to tax the same transactions. The tribes argued that their taxing schemes precluded state taxes for three reasons: first, federal statutes regulating Indian affairs preempted state taxation; second, the state taxes were inconsistent with the

239. 447 U.S. 134.
240. *Id.* at 152-53.

principle of tribal self-government; third, the taxes were invalid by the "'negative implications' of the Commerce Clause."[241]

The Court rejected the tribes' preemption argument for several reasons. Most significantly, the Court denied that tribal taxes merely approved by the federal government preempted state taxation.

> [A]lthough the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.[242]

The inherent sovereign powers of the tribes themselves, absent delegated federal authority, do not preempt states from exercising jurisdiction over the reservations. Rather, tribal authority may preempt state jurisdiction only if it is a delegation of federal authority pursuant to a federal legislative scheme. As the Court explained, "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."[243] In the Court's view, therefore, the federal sovereign managed Indian affairs according to the principles of the empire: state and tribal interests were balanced against each other to meet overriding national interests.

New Mexico v. Mescalero Apache Tribe,[244] decided by the Court in 1983, makes clear the imperial foundations of state and tribal authority under the preemption analysis. The Mescalero Apache Tribe had developed, in conjunction with the federal government, a hunting and fishing resort on its reservation. The tribe, with the help of the federal government, managed its wildlife to accomodate this commercial use. The state sought to impose its more stringent wildlife regulations on non-Indians hunting on the reservation. The Court denied the state's claim, finding that the federal government's involvement with the tribal venture preempted state regulation.

The Court acknowledged that the state could have jurisdiction to regulate wildlife on the reservation. But "[s]tate jurisdiction is pre-

241. *Id.* at 154.

242. *Id.* at 156 (citations omitted).

243. *Id.*

244. 462 U.S. 324.

empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[245] The state was preempted from regulating non-Indian fishing and hunting on the reservation, the Court held, because the tribal resort and wildlife management program was developed as part of a federal program of tribal economic development. "[W]hen a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose."[246] This economic development could be distinguished from the economic development associated with the sale of tax-exempt cigarettes in *Colville* because the federal government was intimately involved in the tribe's resort. It is this federal involvement and identification with a specific federal purpose, that protects tribal governmental and economic interests from state intrusion. By qualifying federal preemption with sufficiently important state interests, the Court left room for the states to pursue their own interests on the reservation, despite federal and tribal policies. State authority over Indian matters within state borders, the Court suggests, is not restricted by tribal governmental authority exercised under federal law if the state's welfare would be adversely affected by activities on the reservation.

C. *Summary*

In the last fifty years, the ideological foundation of Indian policy and law has shifted from one that mixed republican rhetoric and imperial values, to one based solely on imperial visions of federal and state authority. The cases following the Indian Reorganization Act continued to invoke republican notions of dependency to justify federal authority over the tribes. But the federal power arising from that dependency was imperial in nature. With publication of the *Meriam Report*, the poverty and suffering of the tribes was recognized as a national responsibility and identified with the national interest. This committed the federal government to the tribes' welfare for their sake, as well as for the sake of the United States. In addition, this federal duty of protection owed to the tribes was, as a national issue, supreme to the interests of the states. As the Court's opinion in *Seber* made clear, the federal duty justified extraordinary intrusions into state affairs on behalf of the tribes and their

245. *Id.* at 334.
246. *Id.* at 336.

members because conditions in Indian country, like other national problems of the day, compelled the federal government to act.

The Termination and Self-Determination Policies and the judicial decisions made under them broke from the ideology of the first half of the century. In *McClanahan*, *Colville*, and *Mescalero*, the judiciary invoked imperial principles to define the rights of the federal and state sovereigns. Under the preemption doctrine, tribal authority is fused with federal authority because without a preemptive federal policy, tribes are subject to state authority. Republican rhetoric no longer incapacitates the states from governing the tribes or imposes on the federal government a special duty of protection. Rather, the federal government, like an empire, promulgates Indian policy to serve its own interests, and when federal policy fails to identify tribal interests with overriding federal interests, states can extend their authority over the tribes and their members.

VI. CONCLUSION

Indian law is an anomoly in American constitutional law. The Constitution contemplates two types of sovereigns only—the federal sovereign and the state sovereigns. The Constitution, therefore, fails to account for the sovereignty of the tribes. Though their sovereignty was well recognized in international legal doctrine in the late eighteenth century, principles of international law failed to justify the supreme sovereign authority over the tribes that the federal government quickly claimed. Neither the regime of law under the Constitution nor the principles of international law could explain how the tribes could be independent sovereigns but subject to federal sovereign authority. In formulating federal Indian policy and in analyzing the sovereign relationships of the tribes, the states, and the federal government, Congress and the federal judiciary have had to reach beyond the terms of the Constitution and international law to the principles of political organization and sovereignty which informed their visions of the world. Throughout the history of tribal-federal relations, therefore, the federal judiciary has invoked principles of imperialism and republicanism to analyze and define the legal status and rights of the tribes.

In the early nineteenth century, the judiciary invoked both ideologies to explain and define the rights and status of the tribes. As John Marshall held in the *Cherokee Cases*, the tribes possessed organic sovereignty, which the United States recognized through treaties with them, and which precluded state jurisdiction over their territory. In this opin-

ion, the Court enforced an imperial vision of the federal sovereigns as capable of incorporating and governing the tribes, and a republican vision of the state sovereigns as unable to tolerate the tribes, foreign sovereigns within their borders. The republican incapacities of the states justified the Removal Policy, which removed tribes from within states to land west of the Mississippi River, where they could be assimilated. This basic mixture of ideological principles persisted well into the twentieth century. But in the second half of the nineteenth century, the terms and significance of the rhetoric changed.

During the middle of the nineteenth century, the United States pursued an agressively expansionist policy. Imperial values dominated judicial analyses of the tribal-federal relationship as federal authority over the tribes increased. But republican principles of independence and homogeneity emerged to define the relationship of the tribes and their members to the states. Later in the century, from the 1850s to the 1890s, the federal government also pursued policies of forced assimilation under the Reservation Policy and the General Allotment Act. The push for these policies was both imperial and republican. It was imperial in that the United States asserted absolute sovereignty over the tribes and pursued these policies to open more land to white settlement and exploitation. But these policies were also republican because they sought to address the need for homogeneity by assimilating Indians into white society. Furthermore, Indian citizenship, by judicial decisions as well as the General Allotment Act, was tied directly to ownership of private property. Values of the republic concerned with homogeneity and landed independence, therefore, drove federal Indian policy and Indian law decisions into the late nineteenth century.

In the twentieth century, the judiciary continued to invoke the republican rhetoric of dependency to justify federal policies designed to protect the tribes and their members. But classical republican values tying citizenship and independence to private property gave way to the economic values of the empire. In the early twentieth century, property lost its republican significance and was viewed as a source of income for tribes and their members. Under the Indian Reorganization Act, republican values informed ideas about legitimate tribal governments and continued to justify extraordinary federal measures to protect tribal members from state policies. But those federal policies were premised on imperial principles—the federal sovereign, like an empire, could compromise state power over tribes in the interest of remedying the nation's problem of the poor condition of tribal communities.

In the second half of this century, under the Termination and later Self-Determination Policies, the federal judiciary and Congress rejected republican principles of dependency to deny that the federal government bore a duty of protection to the tribes. Republican principles, therefore, have disappeared from judicial analyses of the relationships of the tribes to the federal government and the states. Coincidentally, the Supreme Court has largely rejected the doctrine of tribal sovereignty, as distinguished from tribal governance. Tribal rights of self-government presently are creatures of the federal sovereign. Similarly, federal policy, through the preemption doctrine, determines also the extent of state sovereignty over the tribes, their members, and their territories. In modern Indian law, the judiciary enforces an imperial vision of state sovereignty which extends to all matters within its borders. State authority over tribes no longer is limited by the tribes' dependency. Rather, preemptive federal policies are the only restrictions on state power over the tribes. As an empire, the federal government weighs the interests of itself, the tribes, and the states to develop policies that will serve the interest of the whole nation.